Supreme Court, U.S.
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No. 97-11

In The
Supreme Court of The United States
October Term 1996

ROBERT DALE MURR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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157 pp

QUESTIONS PRESENTED

(1) Whether petitioner was correctly denied a new trial, despite the government's failure to disclose material exculpatory evidence pursuant to *Brady* v. *Maryland* in response to an explicit defense request, on the ground that the defendant should have discovered the evidence on his own.

(2) Whether the prosecution has an obligation to correct what it subsequently discovers is false or misleading testimony.

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PETITION FOR A WRIT OF CERTIORARI

Robert Dale Murr respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions below (Apdxs. A-E) are unreported, except for the opinion of the Court of Appeals for the Sixth Circuit affirming petitioner's original conviction, *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993), *cert. denied, United States v. Murr*, 114 S.Ct. 1070 (1994).

JURISDICTION

The court of appeals entered its judgment on January 31, 1997. (Apdx. D, p. 1). A timely petition for rehearing was denied on March 27, 1997. (Apdx. E, pp 1-2). The petition for a writ of certiorari is accordingly due on June 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. * * * A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is

pending the court may grant the motion only on remand of the case. * * *

STATEMENT

After his continuing criminal enterprise conviction was affirmed on appeal, petitioner discovered that the prosecution had failed to disclose important exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and had failed to correct misleading testimony. The district court, however, rejected petitioner's motion for a new trial, and the court of appeals affirmed. In the Sixth Circuit's view, the evidence was not material to petitioner's guilt because it was impeaching evidence only, and petitioner, at any rate, should have uncovered the evidence on his own.

1. Petitioner was indicted in the United States District Court for the Eastern District of Kentucky on March 13, 1991, on thirteen narcotics counts, including a continuing criminal enterprise charge. The charges involved petitioner's alleged participation in a cocaine distribution conspiracy operating in Tennessee and Kentucky. (C.A. Joint Apdx. 107-117). The prosecution's theory was that beginning in 1988, petitioner, Tommy McKeehan and Jerry Parks would travel periodically into Kentucky and purchase cocaine. The cocaine would be driven back to Knoxville and distributed.

Prior to the Kentucky indictment, the FBI had been investigating cocaine distribution in East Tennessee. FBI

Agent Clyde Merryman was involved in the multi- county investigation. Petitioner was a target of that investigation, as was Johnny Gibson from Blount County who was purchasing some of the Kentucky cocaine. (C.A. Joint Apdx. 536).

In the Summer of 1988, Gibson's girlfriend, Karen Brewer, began cooperating and giving information to the FBI and agent Merryman. Gibson was arrested in May 1989; shortly before that arrest, agent Merryman had arranged to bring Ms. Brewer to Knoxville and put her up at FBI expense and under FBI custody and protection. (Apdx. F, pp. 8-9).

Later in 1991, when petitioner was indicted in Kentucky, he made specific and general requests for the disclosure of favorable evidence in accordance with the prosecution's constitutional Brady obligations. (C.A. Joint Apdx. 166-193). Nothing was disclosed to petitioner regarding agent Merryman's dealings with Ms. Brewer, despite that agent Merryman was a case agent on the Kentucky case and a prosecution witness.

During the Kentucky trial, petitioner then independently uncovered information that agent Merryman had been accused of engaging in an improper personal relationship with Ms. Brewer. The district court inquired into the matter at a bench conference. According to prosecution counsel, agent Merryman had been questioned,

the investigation was over, he was never suspended, and agent Merryman had no personal relationship with the woman. (Apdx. F, pp. 5-7). The district court then questioned the agent under oath, and he represented that he had "some extremely limited contact" with Ms. Brewer "that I should not have had." (Apdx. F, p. 10). He claimed to have been "moderately intimate" with Brewer but denied sexual intercourse. He further denied any disciplinary action had been taken against him. (Apdx. F., pp. 11-14). Accepting the agent's assurances, the district court would not permit petitioner to cross examine the agent about the matter to attack his credibility. (Apdx. F, p. 14).

The jury convicted petitioner on twelve of the thirteen narcotics counts, and he appealed. On April 28, 1992, twelve days after petitioner filed his notice of appeal, a letter was issued suspending agent Merryman for two weeks without pay for his improper conduct with Ms. Brewer. (C.A. Joint Apdx. 490-491). The prosecution never disclosed the disciplinary action. On August 5, 1993, the court of appeals affirmed the conviction. (Apdx. A). Addressing the issue raised on appeal about petitioner's restriction on cross examining agent Merryman, the court of appeals wrote that petitioner had sought to question the agent "about an internal disciplinary investigation that had been resolved in his favor." (Apdx. A). According to the court of appeals, the agent "was not disciplined following the investigation into his conduct, so it had little worth as a challenge to his credibility." (Apdx. A).

Consequently, the court concluded that "[w]hatever probative value might have attached to the FBI's proceedings was substantially outweighed by prejudice to the government." (Apdx. A).

2. On September 8, 1995, petitioner moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Petitioner asserted that he had learned in 1994, only after his trial and direct appeal, that agent Merryman had been suspended, and petitioner contended that testimony given by the agent in 1994 regarding Ms. Brewer varied considerably from the agent's previous testimony at petitioner's trial in 1991. In addition, petitioner asserted that he had learned, only after the trial, about exculpatory information concerning irregularities in the relationship between agent Merryman and the prosecution's star trial witness, Jerry Parks. (C.A. Joint Apdx. 311-327).

The government opposed the motion. On the one hand, it claimed that because agent Merryman's and Jerry Parks' credibility had been challenged at trial "as an issue, raised at trial, and then raised on appeal, the evidence cannot be deemed 'newly discovered.'" (C.A. Joint Apdx. 482). On the other hand, the government insisted that agent Merryman's suspension did not occur until after the trial; therefore, no exculpatory information was suppressed: "It is impossible to use (or to withhold) information that does not yet exist." (C.A. Joint Apdx. 482-483).

On February 20, 1996, the district court denied the new trial motion. (Apdx. B). The court held that before a new trial will be granted, the movant must show (1) "the new trial evidence was discovered after the trial"; (2) "the evidence could not have been discovered earlier with due diligence"; (3) "the evidence is material and not merely cumulative or impeaching"; and (4) "the evidence would likely produce an acquittal." *Id.* at B-2 (citing *United States v. Barlow*, 693 F.2d 954, 966 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983)). According to the district court, petitioner "has failed to satisfy all the elements of the Barlow four-pronged test," (*Id.* at B-2). In particular, the court ruled that it, as well as the Sixth Circuit, had previously addressed "this evidence issue" and "the evidence could not be considered 'newly discovered.'" (*Id.* at B-2). Moreover, "the prosecution is under no duty to produce evidence that is available to the defendant," the court declared. (*Id.* at B-3).

3. The court of appeals affirmed. (Apdx. C & D). The court acknowledged that when agent Merryman was questioned in petitioner's trial about his relationship with Ms. Brewer "he attempted to minimize that relationship." (Apdx. C, p. 3). Nevertheless, in the court's view, "he didn't deny the relationship." *Id.* at C-3. As for the suspension, it did not occur until after the trial, and at any rate, "it is not evidence which is material to the [petitioner's] guilt"; rather, "[i]t is impeaching evidence only." *Id.* at C-3. Finally, for good measure, the court

noted that there was no evidence that the government "knowingly used perjured testimony in this case." *Id* at C-3.

The court also rejected the contention that the prosecution had suppressed favorable evidence concerning personal errands and favors that Parks had performed -- while a paid, confidential informant -- for agent Merryman, which included assisting with child care, paying bar tabs, and home repair projects, (C.A. Joint Apdx. 470-474). "This again," the court concluded, "was simply not evidence which was material to the guilt of this defendant." (Apdx. C, p. 4). Furthermore, in the court's opinion, this evidence "doesn't even meet the test of being undiscoverable prior to trial, had due diligence been used." *Id.* at C-4.

4. Petitioner then filed a petition for rehearing. That petition was denied on March 27, 1997.

REASONS FOR GRANTING THE PETITION

A. The Sixth Circuit's Due Diligence Exception To *Brady* Reflects A Conflict Among The Circuits

1. This Sixth Circuit has held, in a series of cases, that -- even in response to a specific *Brady* request -- prosecutors need not disclose exculpatory evidence that is available to the defense through other sources. In *United States* v. *Todd*, 920 F.2d 399 (6th Cir. 1990), for example, the court held that the government had no duty to disclose interviews reports of key co-conspirators, despite a specific pre-trial request, where the defendant had access to the witnesses and knew that they could "possibly" exculpate him. *Id.* at 404-405. The court explained that the defendant was "aware" of certain "essential fact" -- the identity of the witnesses and the "possibility" that they might help him -- and therefore he could have "take[n] advantage of the exculpatory evidence." *Id.* at 405. Accord, *United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists * * * where the evidence is available to defendant from another source"); *United States* v. *Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994) (notwithstanding a specific request, "the government's failure to disclose potentially exculpatory information does not violate *Brady* * * * "where the evidence is available to defendant from another source").

The prosecution invoked that exception in defending its failure to disclose the Jerry Parks exculpatory information. The court of appeals agreed. The court reasoned that Petitioner should have been aware of Parks' unusual activities while under government protection and acting as a confidential informant, without regard to whether or how Petitioner could possibly have learned about Parks' activities.

2. The Sixth Circuit's narrow conception of a prosecution *Brady* obligations is not unique. Indeed, in the *Clark* case (928 F.2d at 738), the Sixth Circuit traced its "due diligence" rule to the Eleventh Circuit's decision in *United States* v. *Davis*, 787 F.2d 1501 (1986), in which that court had held that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." *Id.* at 1505. The due diligence requirement has long been the law in the Eleventh Circuit. For example, in *United States* v. *McMahon*, 715 F.2d 498 (11th Cir. 1983), the court held that the government was not required to disclose, pursuant to a specific defense request, the reports of two psychiatrists who had examined the government's key witness (a former DEA agent). Citing Fifth Circuit case law, the court explained that "the government is not obliged under *Brady* to furnish a defendant with information which * * * with any reasonable diligence, he can obtain himself."

Id. at 501. Because the defendant "should have known about the two psychiatric reports long before the day of trial," and because his counsel "could have contacted the doctors who prepared the reports," the prosecutors were not obligated under *Brady* to disclose the reports to the defense, even in response to a specific request. *Ibid.* The Eleventh Circuit has repeatedly reaffirmed that principle. See *e.g.*, *United States* v. *Meros*, 866 F.2d 1304, 1308, cert.denied, 493 U.S. 932 (1989).

The Fourth Circuit, in a divided opinion, has likewise embraced the "due Diligence" exception. *Barnes* v. *Thompson*, 58 F.3d 971 (1995). In that case, the court vacated a grant of habeas relief, concluding that the prosecutors had not violated their *Brady* obligations, notwithstanding their failure to honor a request for *Brady* information. In the court's view, "*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." *Id.* at 975 n.4. "Nondisclosure, therefore, does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant." *Ibid.* "According," the court concluded, "*Brady* affords a defendant no relief if he fails to pursue exculpatory evidence, notwithstanding his specific requests for such evidence." *Ibid.*

Although Judge Murnaghan concurred in the judgment for other reasons, he vigorously rejected the proposition that prosecutors are free to withhold exculpatory evidence simply because, in their view, the defendant could reasonably discover it elsewhere. *Barnes*, 58 F.3d at 983-985. Judge Murnaghan pointed out that "a reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the [government] did not possess exculpatory evidence." *Id.* at 984.

3. By contrast, the Tenth Circuit, in its decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), has emphatically rejected the "due diligence" exception, expressly disagreeing with the Eleventh Circuit case law from which the Sixth Circuit rule derives. In *Banks*, the government failed, in response to a pre-trial *Brady* request, to apprise the defense that two other suspects -- including Norman Lee Hicks -- had previously been arrested for the same offense for which the defendant was later convicted. Significantly, the defendant's lawyer, Leslie Earl, had represented Hicks on the earlier charge. The government argued (*id.* at 1516-1517) that Earl should therefore have been aware of Hicks' arrest, and thus "the prosecution had no obligation to turn over the [prior arrest] information."

The Tenth Circuit rejected the due diligence rule. True, the court observed, "if the defense already *has* a particular piece of evidence, the prosecution's disclosure of that

evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Banks*, 54 F.3d at 1517 (emphasis added). But explicitly disagreeing (*id.* at 1517 n.17) with the Eleventh Circuit, the court held (*id.* at 1517) that "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." "The only relevant inquiry," the court added (*ibid* .) "is whether the information was "exculpatory." Because the withheld evidence in that case was both exculpatory and material (*id.* at 1517-1522), the Tenth Circuit affirmed a grant of habeas corpus relief. See also *Hatch* v. *State of Oklahoma*, 58 F.3d 1447, 1470 n.17 (10th Cir. 1995), cert. denied, 1996 U.S. Lexis 3649 (in deciding whether prosecutors committed a *Brady* violation, the court of appeals, following *Banks*, explicitly refused to "rely on the fact that the defense apparently was aware" of the undisclosed fact).

The present case is an appropriate vehicle for resolving this conflict among the circuits. Although the decision in the present case is unpublished, it follows -- indeed, expressly relies on -- settled Sixth Circuit case law absolving prosecutors of any duty to disclose exculpatory evidence where the defense could reasonably find it elsewhere. At least two other circuits afford prosecutors the same exemption from *Brady*. The Tenth Circuit does not.

B. The Sixth Circuit's Decision Is Wrong

A due diligence exception from *Brady* is mistaken for several reasons. First, it unjustifiably constricts the government's *Brady* obligations. With a due diligence exception, a prosecutor need not honor a specific *Brady* request where he or she concludes -- and a reviewing court later agrees -- that the defendant could "reasonably" find the information on his own. But "in the often competitive enterprise of ferreting out crime," prosecutors, no less than any other advocate, "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-450 (1971). There will be a natural instinct to overvalue the defense's capacity for finding favorable evidence on its own, and hence too grudging an instinct for disclosure. In addition, the motive for nondisclosure is increased by the prospect that the defense will be less than fully diligent, thereby relieving the prosecution of the need to deal with the exculpatory evidence at trial.

But that is not all. A prosecutor who withholds material in the face of a specific request thereby *encourages the defense to believe it does not exist.* *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (Blackmum, J.) ("an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exits").

This skews the discovery process, prejudices the defense in its pursuit of exculpatory proof, and impairs the adversary system. The government should not be able to *discourage* the defense from believing there is exculpatory evidence and then defend that non-disclosure on the ground that the defense could have discovered the evidence on its own.

The due diligence exception also has a peculiar "Catch-22" quality. If a prosecutor withholds exculpatory evidence because he believes the defense can find it elsewhere, that judgment will either be right or wrong. If right, then the prosecutor will have a complete exemption from *Brady* , even if the defense fails in fact to find the evidence. If, however, the prosecutor is wrong --*i.e.*, the evidence *cannot* reasonably be found elsewhere -- there would, admittedly, be no *Brady* exemption; but in that event, no one will likely unearth that *Brady* violation, precisely because the defense will fail to find the evidence on its own and will therefore be unable to file an appropriate motion.

The present case illustrates the unfortunate consequences associated with a due diligence exception to *Brady*. On the uncontradicted record, the court of appeals had not basis for assuming, as it did, that petitioner should have known of Parks' activities. These errors and omissions are the inevitable byproduct of recasting the *Brady* duty into a speculative inquiry about what the defense could have or should have done -- rather than focusing on what *Brady* is

really all about: the exculpatory nature of requested evidence and its importance at trial. Those factors alone warranted a new trial on this record, but the court ignored them in favor of its inquiry into due diligence. The court of appeals' decision is clearly wrong and should be reversed.

C. The Sixth Circuit's Due Diligence Exception Is Also Inconsistent With This Court's *Brady* Cases

A "due diligence" exception from the government's *Brady* obligations cannot be squared with this Court's cases. First and foremost, it runs afoul of *Brady* itself. The prosecutor in *Brady* withheld from the defense an extrajudicial statement in which the defendant's accomplice had confessed to the homicide. The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. It did *not* suggest that favorable evidence has been suppressed" only where it is otherwise unavailable to the defendant through due diligence. If anything, the Court suggested just the opposite, noting that "[a] prosecution that withholds evidence *on demand of an accused* * * * does not comport with standards of justice." *Id.* at 87-88 (emphasis added).

More pertinently, in *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court declined the government's explicit invitation to adopt a "due diligence" exception to *Brady*. The

question in *Agurs* was whether the prosecution's failure to disclose the victim's criminal record prejudiced defendant's due process rights. The government sought to pretermit the question of prejudice, however by relying on the dictates of Fed. R. Crim. P.33. Rule 33, which governs motions for a new trial based on newly discovered evidence, generally requires a defendant to show that the evidence "could not have been discovered beforehand in the exercise of reasonable diligence." U.S. Br. 9. Invoking that standard, the government contended (*id.* at 16) that a defendant cannot secure a new trial based on undisclosed evidence "[i]f the defense was on notice of the essential facts concerning exculpatory evidence before trial but elected not to investigate that information." According to the government, "respondent's counsel learned in pretrial interviews that the decedent likely had a criminal record" and "could easily have obtained the particulars of that record by subpoena to the police department" (*id.* at 17-18). "if the defense is not thereby charged with actual knowledge of that information, its subsequent failure to obtain decedent's conviction record constituted a failure to exercise due diligence and therefore forecloses the awarding of a new trial based on this evidence under Rule 33." *Id.* at 18.

The Court, however, rejected the government's invitation to apply the usual standards for newly discovered

evidence. Those standards might apply, the Court explained, where the defendant bases his new trial motion on evidence obtained "from a neutral source after trial." *Agurs*, 427 U.S. at 111. But "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category" (*ibid.*), the Court stated. "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid.*

In the Court's more recent *Brady* cases, it has never suggested that a defendant's failure to exercise due diligence -- by locating the exculpatory evidence on his own -- might excuse the government's *Brady* obligations. If anything, the Court has suggested just the opposite, at least in cases where the defense has requested *Brady* information and the government has provided an incomplete response. In *United States* v. *Bagley*, 473 U.S. 667 (1985), the government conceded (see *id.* at 682), and five Members of the Court agreed (see *ibid.* (Blackmun, J.); *id.* at 690 (Marshall, J., dissenting); *id.* at 714 (Stevens, J., dissenting)), "than an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of

representing to the defense that the evidence does not exist." *Id.* at 681 (Blackmun, J.).

And the Court's most recent *Brady* decision, *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), contains not the slightest support for a due diligence exception to *Brady*. In short, to the extend this Court's cases address the issue at all, they undercut a due diligence exception to the scope of prosecutors' duty of disclosure. This case affords the Court an opportunity to consider, and reject, that unwarranted exception to *Brady*..

D. The Sixth Circuit's Rejection Of A *Brady* Obligation To Correct Inaccurate Information Is Wrong

Due process is not a mechanism designed to punish the executive branch, and an accused who obtains release under *Brady* does not receive a windfall. On the contrary, reversal of an accused's conviction is essential to ensure that the trial process can be relied on as having produced a just result.

When the prosecution fails to correct what it subsequently discovers was false or misleading testimony, the adversary process is thereby impaired. See *United States* v. *Alzate*, 47 F.3d 1103 (11th Cir. 1995). In the present case, the court of appeals relieved the prosecution, however, of any obligation to set the record straight on agent

Merryman's original testimony to the district court. This view is wrong.

Presumably, the court of appeals would have regarded the situation differently had agent Merryman been disciplined at the time he related his "moderately intimate" conduct with Ms. Brewer to the district court. This approach penalizes, as it should, an outright deception; but it rewards the more sophisticated deception -- one that subtly suggests an inaccurate conclusion. And what is more, such an approach disavows any responsibility to disclose subsequent information that would correct the earlier, erroneous conclusion. This approach is clearly wrong and should be rejected.

E. The Questions Presented Have Important And Recurring Implications For The Operation Of Federal And State Criminal Discovery

The scope of the government's *Brady* obligation is absolutely crucial to the day-to-day operation of the criminal justice system. Defense counsel file *Brady* requests in virtually every case, often (as in petitioner's case) with great specificity. They do so to obtain critical evidence -- evidence that, by its very nature, may spell the difference between a verdict of guilty and one of not guilty, or (quite literally) between life and death. See *Kyles* v. *Whitley*, 115 S.Ct. 1555 (1995).

What is more, precisely because a criminal defendant is entitled to rather limited discovery, at least in the federal system, defendants rely on *Brady* requests as a central source of discovery material. The "due diligence" exception impairs that regime. It authorizes the government to withhold exculpatory information -- even to deny that any exists -- whenever the prosecutory believes that the defense, through a failure of its own diligence, may fail to find it elsewhere. Not only does such behavior deprive the defense of key evidence, it also sends the false signal that no such evidence exists.

This case presents the Court with an opportunity to resolve a circuit conflict by rejecting and unjustifiable -- but widely invoked -- qualification on the scope of *Brady*.

This case further presents the Court with an opportunity to preserve the adversary process by making the prosecution responsible for correcting what it later learns is false or misleading testimony.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nos. 92-5522/92-5730
Filed August 5, 1993

Pages A-1 thru A-92

APPENDIX A

Nos 92-5508; 92-5512; 92-5521 to 92-5523; 92-5529

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT PHIBBS (92-5509);
VICTOR ROJAS (92-5512/92-5523);
DIANE WHITED (92-5521);
ROBERT DALE MURR (92-5522/92-5730);
RAYMOND HUCKELBY (92-5529),
Defendants-Appellants.

Argued June 7, 1993
Decided August 5, 1993

Defendants were convicted in the Eastern United States District Court, Eastern District of Kentucky, Henry R. Wilhoit, Jr., of various drug distribution and conspiracy offenses, and they appealed. The Court of Appeals, Ralph B. Guy, Jr., Circuit Judge, held that: (1) evidence was sufficient to support challenged convictions; (2) prosecution of codefendant tried in absentia did not have to be severed; (3) witnesses with psychiatric problems did not have to be barred from testifying on grounds of incompetency; and (4) there was no error shown in application of Sentencing Guidelines.

Affirmed.

James E. Arehart, Asst. U.S. Atty., Karen K. Caldwell, U.S. Atty., Frances E. Catron, Asst. U.S. Atty. (argued and briefed), Office of U.S.Atty., Lexington, KY, Jacquelyn A. Jess, Asst. U.S. Atty., Office of U.S. Atty., Covington, KY, for Plaintiff-Appellee U.S.

Andrew M. Stephens (argued and briefed), Lexingon, KY for defendant-appellant Robert Phibbs.

Fred E. Peters (argued and briefed), Lexington, KY, for defendant-appellant Diane Whited.

Ann C. Short (argued), Herbert S. Moncier (briefed), Knoxville, TN, for defendant-appellant Robert Dale Murr.

Derek G. Gordon (argued and briefed), Anggelis, Philpot, Gordon & Simpson, LexinGton, KY, for defendant-appellant Raymond Eugene Huckelby.

Before: **GUY** and **SUHRHEINRICH**, Circuit Judges, and **DOWD**, District Judge.[1]

RALPH B. GUY, Jr., Circuit Judge.

Defendants, Raymond Huckelby, Diane Whited, Robert Phibbs, Victor Rojas, and Robert Murr appeal their convictions arising from their participation in a cocaine distribution ring operating in Tennessee and Kentucky. In addition, Phibbs and Rojas challenge the appropriateness of their sentences.

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[1]*The Honorable David D.Dowd Jr. United States District Court for the Northern District of Ohio, sitting by designation.*

Huckelby takes issue with the sufficiency of the evidence supporting his convictions. Along with the other defendants, he also expressly adopts and incorporates by reference all common issues raised by his co-defendants.

Whited raised the following allegations of error: (1) her convictions were not based upon sufficient evidence; (2) the district court should have granted a mistrial as a result of prejudicial statements made by a government witness; (3) the court should have severed a co-defendant who was tried in absentia; (4) the government was improperly permitted to elicit certain evidence that was prejudicial to the defense; (5) two key government witnesses should have been declared incompetent to testify; and (6) the court unduly restricted her ability to cross-examine a government agent.

Phibbs alleges that: (1) the district court's approach to the voir dire of the jury venire was in error: (2) two government agents were improperly allowed to remain in the courtroom through the proceedings, despite the fact they served as witnesses: (3) the evidence underlying his convictions was insufficient; and (4) he should have been afforded a reduction in sentence due to his acceptance of responsibility for his offenses, as well as for his "minimal" role in the drug distribution ring.

Rojas argues the following points: (1) the government misused both its grand jury and its administrative subpoena powers; (2) the district court erroneously denied both his motion in limine to suppress evidence of his Columbian ties; (3) he was not provided

with a "photospread" used by a government witness in her pretrial identification of him; (4) he was improperly deprived of confidential presentence information; and (5) the district court should have given him a reduction in sentence due to his acceptance of responsibility for his offences.

Murr contends that: (1) the government breached the terms of a pre-existing plea agreement with him, leading to his prosecution in the instant case; (2) the evidence presented at trial was insufficient to sustain his convictions; (3) the district court erred in denying him a bill of particulars in relating to his continuing criminal enterprise charge, as well as in refusing to give the jury special instructions requested by him; and (4) the government failed to turn over vital *Brady* and Jencks Act evidence to the defense.

We affirm the convictions and the sentences of all five defendants.

I.

On February 23, 1990, Jerry Parks was detained by agents of the FBI in Nashville, Tennessee, in connection with an ongoing drug investigation. After discussions with the government, he agreed to cooperate in the probe.

Parks revealed that his friend, Robert Murr, had visited him a number of times during the summer of 1988 when Parks was residing in a federal "halfway house" in Bowling Green, Kentucky. On some of those occasions, Murr would deliver cocaine to him to sell. Murr wanted

Parks to come to Knoxville, Tennessee, to work for him in his drug distribution venture. He directed Robert Phibbs, who was on the payroll of one of Murr's legitimate businesses, Automotive Enterprises, to write a letter to Parks' federal probation officer requesting that he be allowed to transfer to the Knoxville area. Murr told Phibbs to promise the probation authorities that Parks would be provided with a job at Automotive Enterprises. His efforts were rewarding, and Parks was permitted to move to Knoxville.

Parks' position at Automotive Enterprises was a subterfuge; he actually spent his time helping Murr distribute cocaine. In August of 1988, Murr arranged to sell four kilograms of cocaine to Billie Dye and David Blurt. Parks and Dye gathered approximately $100,000 in cash and, pursuant to Murr's instructions, started out for Lexington, Kentucky, where they were to meet with Murr. The pair had car trouble, however, and arrived in Lexington several hours late. After checking into a hotel, Parks called Murr's ex-wife, Judy, the following morning for guidance as to what to do next. Based on his conversation with her, he and Dye returned to Knoxville, where the transaction was consummated the next day.

Beginning in September of 1988, Parks travelled with Murr and another drug dealer named Tommy McKeehan to the Lexington area every few weeks to obtain multi-kilogram quantities of cocaine. During the first such trip, Parks became acquainted with Murr's drug source,

Kenneth Lawson. Whenever Murr needed cocaine, he went with McKeehan to a pay telephone and called Lawson. After a deal had been struck, Murr, Parks, and McKeehan would meet at Judy Murr's residence early in the morning before leaving for Kentucky. Murr and McKeehan would then organize the money to be used in the sale into $1,000 bundles, putting these stacks in brown paper bags.

Aside from taking part in these trips, Parks served as the "front man" for the drug distribution ring. Murr introduced Parks to his regular cocaine customers, including Raymond Huckelby and Edward Rogers. At such meetings, Murr would instruct Parks with regard to the amount of cocaine to be supplied, the price of the drug, and how often it was to be furnished. He would then tell Parks and the purchaser to exchange telephone numbers, beeper numbers, and beeper codes in order to stay in contact. For several months, Parks delivered drugs to Murr's customers in this fashion. When Murr was unavailable, Parks would turn over the money he received in return to either Phibbs or to Judy Murr.

In October of 1988, Parks first encountered Victor Rojas while on one of the excursions to Kentucky he made with Murr and McKeehan to buy cocaine. Rojas, who was Lawson's supplier, brought the drugs to the location where the sale would take place. He usually drove a red Jeep, hiding the drugs in the back inside one or more shopping bags, and wrapped in separate kilogram packages. The bags

were covered in coffee grounds to mask the odor of the cocaine.

Parks, Murr, and McKeehan would either give their money to Lawson or would leave it in Rojas' vehicle, taking the cocaine for which they had paid. McKeehan would then be given his share. After the drugs were driven back to Knoxville, Parks and Murr stashed them at the house Murr rented for his girlfriend, Diane Whited. She stored the cocaine in the attic in a green duffel bag with a padlock on it. In order for Parks to get the cocaine from Whited's house to distribute, he would have to contact Murr who, in turn, would call Whited to set up a time for the two of them to come over. Parks went to Whited's residence 15 to 20 times in the fall of 1988 to pick up drugs. On at least one occasion, Whited assisted Murr and Parks in breaking down the cocaine into salable quantities.

Keeping the cocaine at Whited's house proved to be unworkable because Parks needed ready access to the stash, and Murr would not let Parks enter the house without him. At the end of November of 1988, Murr told Parks to bury the cocaine in a pipe on the side of a hill behind Automotive Enterprises. The only person besides Parks who knew exactly where the drugs were hidden was Phibbs.

The drug distribution ring was so successful that Murr and Lawson talked about what should be done with the rather substantial profits. Murr recognized that he could "launder" some of the funds through his business partner, Ernie Nicely. The companies that he had established with

Nicely were not doing well, so Murr began to funnel money to him to keep them afloat. Nicely understood that the bulk of this money was derived from drug sales.

After November of 1988, Murr no longer wanted to accompany Parks and McKeehan to Kentucky to obtain cocaine. Consequently, he sent the two of them alone to complete deals in February, March, April, and May of 1989. Around the time of the May transaction, Rojas began to get nervous about the way in which the meetings were scheduled. He approached McKeehan and gave him a slip of paper with a telephone number on it, imploring him and Parks to contact him directly in the future. When they returned to Knoxville, McKeehan asked Murr whether it would be permissible to bypass Lawson in light of Rojas' overtures. Murr indicated that this was acceptable to him. Approximately 10 days later, Parks and McKeehan set up a transaction with Rojas in the manner he suggested.

Shortly thereafter, on May 22, 1989, the Knoxville police arrested Parks for burglary. He was wounded while in the process of being apprehended. The authorities subsequently seized a set of electronic scales and six address books from him. One of these books contained records of Parks' drug related activities that month, and included a coded list of some of Murr's customers, as well as a description of the drug ring's cocaine inventory.

Despite Parks' arrest, the drug ring continued to operate. Jim Hurt soon took over some of Parks' functions, delivering cocaine for Murr to Edward Rogers, and possibly

others. However, when Rogers complained about the poor quality of the cocaine that Hurt was selling him, Murr began to personally supply Rogers. This continued until August of 1989, when Murr himself was arrested on federal drug charges. Afterwards, Phibbs tried to collect money from Rogers which he claimed Rogers owed Murr for drugs.

On April 11, 1990, Vivian Cummins observed three men sitting inside the Berea, Kentucky, restaurant where she was employed. They had been drinking coffee for over three hours, and were watching cars pass by on the adjacent highway, Interstate 75. They were eventually joined by a fourth man, later identified as Victor Rojas. Not long after Rojas arrived, Cummins saw the group leave the restaurant and gather in the parking lot around two vehicles, one of them a black Mercedes-Benz. When two of the men quickly exchanged packages, she became suspicious and called the local police.

Rojas and Kenneth Lawson, who was another of the individuals Cummins noticed in the restaurant, were riding in a black Mercedes-Benz when it was stopped by two Berea police officers. Rojas told the officers that he was in Kentucky to sell parts for electric signs. Lawson, however, claimed that he did not know Rojas.

The car was ultimately searched by the Kentucky State Police, who uncovered $124,500 in United States currency. The money was wrapped in $1,000 packets with colored rubber bands. The $1,000 bundles were combined

into packages of $5,000 in several small brown lunch-type bags, a grocery bag, and a white plastic bag. These bags were then stuffed into a cardboard box which was taped shut. The box was then placed inside a brown shopping bag with handles. In addition to discovering the cash, the state police detected coffee grounds on the pavement beneath the car, on the bumper of the vehicle, and inside the brown shopping bag. A IDEA chemist tested the shopping bag for the presence of controlled substances, and determined that it contained traces of cocaine.

Murr had entered into a plea agreement with the government in January of 1990 in the Eastern District of Tennessee. It was not until Parks had been questioned in late February of 1990 that the government became aware of Murr's cocaine venture extending into Kentucky. At that time, Parks had spoken of a individual named "Tony" who, with the assistance of Kenneth Lawson, furnished cocaine to Murr's drug distribution ring. After the events of April 11, 1990. Parks realized that "Tony" was actually Victor Rojas.

On May 2, 1990, a federal grand jury returned a one-count indictment charging Rojas with possession of cocaine with the intent to distribute the drug, pursuant to 21 U.S.C. § 841(a)(1). Upon motion of the government, the district court ordered the indictment and any subsequent pleadings sealed. In the fall of 1190, the FBI could not determine the whereabouts of Rojas. Consequently, on October 10, 1990, the district court approved the issuance

of a bench warrant for his arrest.

On March 13, 1991, a federal grand jury returned a 13-count superseding indictment against Victor Rojas, Robert Murr, Robert Phibbs, Diane Whited, Raymond Huckelby, and eight other defendants, including Billie Dye, David Hurt, Kenneth Lawson, Tommy McKeehan, Mary Lawson, William Baird, Reba England, and Edward Rogers. A trial date was set for September 9, 1991.

The indictment, which was unsealed two weeks later, charged the 13 defendants with conspiring to possess cocaine with the intent to distribute the drug, in violation of 21 U.S.C. § 846. It also charged each of them with 11 counts of cocaine distribution, or aiding and abetting such distribution, in accordance with 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The incidents underlying these counts purportedly took place between August 25, 1988, and April 11, 1990. In addition, Murr was alleged to have operated a continuing criminal enterprise as defined under 21 U.S.C. § 848.

Kenneth Lawson failed to appear for trial in September of 1991, and a bench warrant for his arrest was handed down. McKeehan, Rogers, and David Hurt reached plea agreements with the government and took the stand against their codefendants, Billie Dye and Reba England also plea bargained. Mary Lawson moved for a judgment of acquittal, which was granted by the district court. On October 9, 1991, the jury found Rojas guilty on all 12 counts against him. Huckelby and Phibbs were both

convicted of conspiracy and on nine distribution counts. Whited was convicted of conspiracy and on three distribution counts. Murr was found guilty of conspiracy, managing a continuing criminal enterprise, and on 10 distribution counts. Kenneth Lawson, who was tried in absentia, was convicted of conspiracy and on 10 distribution counts. William Baird, who had been partially successful on a motion for judgment of acquittal, was found not guilty of the remaining charges against him.

II.

Raymond Huckelby

Sufficiency of the Evidence

Huckelby contends that the evidence presented at trial was insufficient to support his conviction for conspiracy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846); as well as on nine counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2).

The standard of review for claims of insufficient evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Evans*, 883 F.2d 496, 501 (6th Cir. 1989) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 I,.Ed.2d 560 (1979)) (emphasis in original).

In order to obtain a conviction pursuant to 21 U.S.C.

§ 846, "the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join and participated in the conspiracy." *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir.1990) (quoting *United States v. Stanley*, 765 F.2d 1224, 1237 (5th Cir. 1985)). No formal or express agreement is necessary to establish a conspiracy under § 846. *United States v. Hughes*, 891 F.2d 597, 601 (6th Cir.1989). "[A] tacit or mutual understanding among the parties' is enough. *Id.*

The essential elements of a violation of 21 U.S.C. § 841(a)(1) are "for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance." *See United States v. Pope*, 561 F.2d 663, 669 (6th Cir.1977). "To be found guilty of the crime of aiding and abetting a criminal venture [18 U.S.C. § 2], a defendant must associate himself with the venture in a manner whereby he participates in it as something that he wishes to bring about and seeks by his acts to make succeed." *United States v. Knox*, 839 F.2d 285, 294 (6th Cir.1988).

At trial, ferry Parks testified that in September of 1988, defendant Robert Murr introduced him to a number of individuals "for the distribution of cocaine in [Murr's] network." The first person that Parks met through Murr was Huckelby. Parks and Murr went to Huckelby's jewelry store in Knoxville, Tennessee, where they were taken into a back room to meet with him. While in the rear of the store, Murr asked Parks whether he and Huckelby would

"ha[ve] any problem dealing with each other." Parks replied in the negative. Murr then told Huckelby "who [Parks] was and how long he'd known [him] and asked if he had any problem dealing with [Parks.]" *Id.* Huckelby said that he did not. Afterwards, Huckelby and Parks "exchanged telephone numbers, beeper numbers and codes." Murr informed Parks that he would be delivering ten ounces of cocaine at a time to Huckelby at a price of $1,000 an ounce. Parks testified that, after this initial introduction, he regularly provided ten-ounce quantities of cocaine to Huckelby and received cash in return. The drugs were obtained by Murr and his associates by way of Kentucky, and were transported to co-defendant Diane Whited's residence in Knoxville for storage.

Parks' testimony was corroborated by information contained in one of the books seized from his residence when he was arrested for burglary in May of 1989. Parks confirmed that the book contained records of drug transactions that took place between April 10, 1989 and May 21, 1989. He had kept similar records before that time, but Murr told him to destroy them "as soon as the drugs were paid for and out of our possession." According to Parks, ledger entries indicated that, on May 15, 1989, ten ounces of cocaine were distributed to Huckelby, who was referred to in the book as "Huck."

In addition, an address book taken from Parks' residence listed Huckelby's home, office, and beeper telephone numbers. Parks testified that he did, in fact,

contact Huckelby by telephone between August 1988 and May 1989 regarding cocaine purchases. To buttress his testimony, the government introduced telephone records showing that, from August through November of 1988, as well from February through May of 1989, calls were placed on Murr-related telephones to Huckelby's office and beeper numbers. During the same periods, calls were made from Murr-related telephones to several of Huckelby's co-defendants.

Huckelby's conversation in the back of his jewelry store with Parks and Murr gave rise to the inference that he was well aware he was obtaining cocaine as part of a group venture. It demonstrated that he was not simply a street buyer engaging in a discrete transaction, but that he knew he was involved in an ongoing conspiracy of some dimension. That Murr told Parks that Huckelby was part of his drug distribution network, and the fact that Parks delivered significant quantities of cocaine to Huckelby at regular intervals, suggested that Huckelby indeed had such an understanding. *See United States v. Baker*, 905 F.2d 1100, 1106 (7th Cir.), *cert. denied*, 498 U.S. 876, 111 S.Ct. 206, 112 L.Ed.2d 167 (1990) (holding that, while mere buyer/seller relationship alone does not support conspiracy conviction, evidence of "repeat purchases or some other enduring arrangement that implies knowledge of the scope of the conspiracy" may suffice). His telephone records, as well as Parks' books, provided additional proof that Huckelby was caught up in the affairs of the charged

conspiracy.

While some of this evidence was circumstantial in nature, even circumstantial evidence standing alone may sustain a conviction so long as the totality of the evidence was substantial enough to establish guilt beyond a reasonable doubt. *See United States v. Green*, 548 F.2d 1261 1266 (6th Cir.1977). We are satisfied that this standard was met and find there was sufficient evidence that Huckelby knew of intended to join and participated in the conspiracy.[1] He therefore assumed responsibility for every act committed to further its objectives which was reasonably foreseeable. *See United States v. Martin*, 920 F.2d 345 348 (6th Cir.1990).

With regard to Huckelby's violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 Parks described how he Murr and defendant Tommy McKeehan travelled to Kentucky every few weeks from September 1988 through May 1989 (the time frame of the counts upon which Huckelby was found guilty) to purchase cocaine from defendants Kenneth Lawson and Victor Rojas. Parks told the jury that the drugs sold to Huckelby were procured

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[1]Huckelby asserts that no evidence was adduced that he was present in the Eastern District of Kentucky during the life of the conspiracy. This, however, is of no moment. Venue lies in any district in which an overt act was committed in furtherance of the charged conspiracy. *See United States v. Turner*, 936 F.2d 221, 226 (6th Cir.1991).

during these trips. The entries in Parks' books were consistent with his account of Huckelby's culpability as were Huckelby's telephone records. Accordingly the government showed that Huckelby as a marketer of cocaine "associate[d] himself' with the drug distribution ring and "[sought] by his acts to make is succeed." *Knox*, 839 F.2d at 294.

Huckelby nonetheless calls our attention to Parks' psychiatric history and his role as a government informant apparently in an attempt to have us reassess his credibility. This we will not do. Credibility determinations are the province of the trier of fact and are not to be disturbed on appeal when considering the sufficiency of the evidence underlying a defendant's conviction. Parks' alleged deficiencies as a witness were amply explored in the course of cross-examination.

III.

Diane Whited

A. Sufficiency of the Evidence

Whited was convicted of conspiracy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846), as well as on three counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2). The latter convictions were the result of conduct which occurred in September, October, and November of 1988. She challenges the sufficiency of the evidence sustaining the guilty verdicts returned against her.

At trial, Jerry Parks testified that defendant Robert Murr rented a house in the Martha Washington Heights subdivision in Knoxville, Tennessee, for Whited, who was his "girlfriend." Murr and Parks would store a large portion of the cocaine they bought in Kentucky there. In September of 1988, they went to the house for such a purpose. According to Parks, he and Murr

> went upstairs and took the cocaine into a bedroom, and [Murr] told Diane Whited to go into the other room and to get the stash. She was gone a few minutes. I heard her pull out an exit door in the hallway. She climbed up in the step, secured a green duffle bag, which had a padlock on it, and brought it into the bedroom. Mr. Murr had a key on his key ring. He opened up a lock on the duffle bag and pulled out two PVC pipes. We opened it up and put one of the kilos of cocaine in there. He told Ms. Whited to go into the kitchen or wherever she kept her bags and got haggles and roll of aluminum foil and brought back in the bedroom. Mr. Murr had a pair of scales there, digital scales, and we weighted the cocaine. We put [it] in one ounce bags, put green rubber bands around it, wrapped it up, put tinfoil around that, put it back in PVC pipes, secured the lids on it, put [it] back in the green duffle bag locked that put it back in the attic.

Parks recalled that it was Whited who took the cocaine and hid it in the attic.

Parks testified that he and Murr were "probably over" at the house with Whited "15-20 times" through the fall of 1988. When questioned in greater detail he confirmed that in September October and November of 1988 they brought cocaine "to the stash house Diane Whited's stash house" where it was broken down in "pretty much the same manner" and later distributed.

In order for Parks to remove cocaine from the house to sell he would have to call Murr "and make arrangements to meet him to go out to the house in Martha Washington Heights.... Sometimes Ms. Whited would be at home sometimes she wouldn't." Parks was not allowed to go there by himself. He and Murr "would drive to the area. [Murr] would use his cellular phone. And if [Whited] was there she would open the door"; otherwise Murr would use his keys to enter the house. This arrangement became unworkable after November of 1988 because Parks needed easier access to the cocaine supply and it was at this point the drugs were buried in a pipe on property behind Automotive Enterprises.

Gene Doss, a long-time resident of the Martha Washington Heights subdivision testified that Murr and Whited called themselves "Don Stallings" and "Janet Stallings" during the time they spent there. Doss described the basement windows of Whited's house as "covered with some sort of material " as were the garage door the entrance

door and a third door. There were fish-eye peepholes in the windows and the doors. He also remembered seeing a large safe being taken out of the residence.

Viewing the evidence in the light most favorable to the government a rational jury could have concluded that Whited "knew of intended to join and participated in the conspiracy." *Pearce*, 912 F.2d at 161 (quoting *United States v. Stanley*, 765 F.2d 1224 1237 (5th Cir.1985)). She consciously handled and concealed the cocaine stored at her residence, exercising dominion and control over the drugs. In fact, she was entrusted with their safekeeping for a number of months. Doss' testimony concerning Whited's alias and her home security measures further indicated that she was not merely associated with members of the drug distribution ring, but played an active role in the enterprise. Similarly, evidence was educed that she possessed at least a kilogram of cocaine on or about the dates set out in the counts upon which she was convicted. The intent to distribute could be inferred from such a large amount of drugs. *See, e.g. United States v. Welebir*, 498 F.2d 346 (4th Cir.1974).

B. Mistrial Based Upon Jerry Parks' Statements

Whited also argues that the district court should have granted defendants' motion for a mistrial following remarks made by Jerry Parks on cross-examination.

Parks was questioned by Robert Murr's counsel regarding the $35,000 to $40,000 he estimated he was paid

by the government to compensate him for his services and his expenses. In explaining what the money was used for, and why he was uncertain whether his estimate was correct, he told the jury that

> [a] lot of this money, and I don't know whether it is listed here or not, is for my protection. I have been threatened by these witnesses. I have been threatened by the defendants and their wives. I have been threatened by several people. I actually recorded . . . [r]ecorded threats, who has a contract on me. I had to move. I had to get more money from the FBI. I don't know whether this represents all of it or not. I am telling you I spent a lot of their money. This is what they say I spent. I don't know whether this represents all of it or not. I am telling you I spent a lot of their money. This is what they say I spent. I don't know whether this is extra money, whether this represents every single nickel I got from the FBI. I spent a lot of money.

After Parks finished his statement, Murr's counsel did not raise an objection but continued his line of questioning.

At the close of the day's proceedings, defendant Mary Lawson's attorney moved for a mistrial on the basis of Parks' remarks concerning the threats he allegedly received from defendants and their spouses. The other defendants subsequently joined the Notion. The district court replied:

> Now, in regard to Mr. Parks' response, it was in response to the cross-examination of him being paid all this money. The inference being raised to the jury, well, you know, that's a lot of walking around money, 35 or $40,000. That's outrageous. Why would the Government be paying you all kinds of money like that for services and/or expenses? And I allowed shim to defend himself. This was in response to cross-examination, direct response as to why it would take 35 or $40,000. and that's what he has to say. That's what he had to say. It may not be true. The jury may not believe it.
>
> But, Mr. Hicks, the books are full of cases where threats have been shade, glaring, intimidating looks have been made in order to -- and witnesses have been murdered, witnesses have been murdered. And that is -- if that happens, it is competent, it is relevant, and the circuits have upheld that kind of testimony for as long as I can remember.
>
> So your motion for mistrial is overruled.

Lawson's counsel went on to express surprise that the district court would allow "bald assertion[s]" of threats and intimidation into evidence. The court, however, opined that it "allowed the testimony to come in for what it's worth.... It goes to the weight of the testimony and not its admissibility." When Lawson's counsel persisted in claiming that Parks' statements were unfounded, the court

asked: "You want me to have Mr. Parks go into it again tomorrow morning in more detail to see if there is a factual basis in front of this jury?" Lawson's counsel answered in the negative; instead, he wanted the jury admonished that Parks' "bald assertion that these defendants tried to kill him is not to be used as far as Mary Lawson is considered." The court refused, and also refused similar requests by the other defendants.

"A defendant may move for a mistrial where there is a legitimate claim of seriously prejudicial error," such that the defendant is unable to obtain a fair trial. *United States v. Moore*, 917 F.2d 215, 220 (6th Cir.1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1590, 113 L.Ed.2d 654 (1991). "The denial of a mistrial is generally within the discretion of the trial court," and our review of the court's ruling is confined to whether the trial court abused its discretion. *Id.*

Here, the government did not elicit the allegedly prejudicial statements and did not repeat them. *See, e.g., United States v. Tarantino*, 846 F.2d 1384, 1413 (D.C.Cir.1988). Significantly, defendants did not make a contemporaneous objection to the remarks on grounds of prejudice, or on any other grounds. As the district court pointed out, the remarks might not have been prejudicial at all. They were surely not what defendants wanted to hear, but they were offered as a legitimate response to a question concerning substantial payments to Parks by the government. The existence of these payments might well

have damaged his credibility, if not justified to the jury's satisfaction. Parks' claim of threats was not wholly implausible on its face; such incidents have been known to occur. Defendants had an opportunity to challenge the veracity of the claim; they deliberately chose not to take up the cudgel. While certain statements are so prejudicial that the defense should not be required to rebut them, and the jury should riot be left to weigh their value, we are convinced that the instant case did not involve such a situation.

We also note that, in the case at bar, the remarks at issue "constitute[d] but a small portion of the total testimony at trial." *United States v. Bowers*, 739 F.2d 1050, 1055 (6th Cir.), *cert. denied*, 469 U.S. 861, 105 S.Ct. 195, 83 L.Ed.2d 128 (1984). They were made well before the start of the jury's deliberations, deliberations which produced not guilty verdicts on several of the counts charged in the indictment. For all of these reasons, we hold that the district court did not abuse its discretion in denying defendants' mistrial motion.

C. Motion to Sever Defendant Kenneth Lawson

A motion was made by Robert Murr to sever defendant Kenneth Lawson prior to trial, when it appeared that Lawson would not be present for the proceedings. This motion was denied by the district court, and Whited contends that this was in error.

A district court's denial for severance is reversible only for an abuse of discretion. *United States v. Warner*,

690 F.2d 545, 552 (6th Cir.1982). "Once defendants have been properly joined under Federal Rule of Criminal Procedure 8(b), a 'strong showing of prejudice' is required to justify severance." *United States v. Hessling*, 845 F.2d 617, 619 (6th Cir.1988) (quoting *United States v. Reed*, 647 F.2d 678, 689 (6th Cir.), *cert. denied*, 454 U.S. 837, 102 S.Ct. 142, 70 L.Ed.2d 118 (1981)). The jury must be unable "to decide fairly and separately the guilt or innocence of each defendant." Moore, 917 F.2d at 220.

Whited argues that defendants were harmed because the jury might have inferred that Lawson did not show up for trial because he was guilty, and then concluded that his codefendants must also he culpable. In addition, Whited asserts that they were prejudiced when the jury was exposed to extensive testimony concerning Lawson's activities, while "no one was there to challenge this testimony."

"As a general rule, persons jointly indicted should be tried together." *United States v. Stall*, 743 F.2d 439, 446 (6th Cir.1984). This is because there is almost always common evidence against the joined defendants that allows for the economy of a single trial. In the instant case, a large portion of the evidence presented, including that related to Lawson, was applicable to each defendant to show the scope of the charged conspiracy. While Lawson was not there to "challenge" his alleged participation at trial, his codefendants had the opportunity to convince the jury that they were not associated with him. "Absent a showing of substantial prejudice, spillover of evidence from one case

to another does not require severance." *Moore*, 917 F.2d at 221 (relying upon *United States v. Gallo*, 763 F.2d 1504, 1526 (6th Cir.1985)). Defendants have not made such a showing here.

The fact that a defendant sought to escape prosecution is usually relevant in establishing culpability, so we understand Whited's anxiety about "transferred guilt" due to Lawson's flight. However, the district court neutralized any adversity Lawson may have caused his co-defendants by his actions. It gave a cautionary instruction that each defendant's case was to be considered separately and, further, that Lawson's flight could not be used as evidence against anyone but him. The jury appears to have heeded the court's admonition, as defendant William Baird, allegedly a close companion of Lawson's, was acquitted of conspiracy. Other defendants were acquitted on some of the distribution counts brought against them. Thus, the jury was plainly able to view them as distinct individuals in rendering its verdicts. As this was so, the district court did not abuse its discretion in denying the motion to sever Lawson.

D. The Government's Use of Prejudicial Evidence

Whited next contends that the government elicited, or sought to elicit, a variety of evidence that was prejudicial to defendants, thereby warranting reversal.

Specifically, she asserts that the government repeatedly sought to admit testimony related to meetings in

Tennessee and Virginia where cocaine allegedly was obtained from Kenneth Lawson and Victor Rojas. As this evidence was never presented to the jury, defendants suffered no harm.

Whited also takes issue with the government being permitted to present testimony that cocaine was acquired by Jerry Parks from Robert Murr while Parks was living at a halfway house in Bowling Green, Kentucky. The district court, however, allowed such evidence to establish the beginning of Parks' dealings with Murr. In our view, this was proper.

Additionally, Whited argues that the "defense was left helpless . . . to rebut the inflammatory nature" of Jerry Parks' testimony regarding threats allegedly made to him by defendants and their spouses. She seems to claim that the government should have either substantiated the allegations or sought to counteract their effect. We have already determined that reversal is not required as a result of Parks' statements.

Whited also complains that she and her co-defendants were harmed by the government's questioning of witness Ernie Nicely regarding loans allegedly extended to Robert Murr and his ex-wife, Judy, and promissory notes memorializing those loans. The district court struck Nicely's testimony on the basis of a pretrial ruling excluding such evidence. The trial judge cautioned the jury to disregard the testimony, and we believe that he cured any harm to defendants in doing so.

Finally, Whited contends that defendants were prejudiced both by statements from Nicely that Robert Murr was arrested on the same day he was seen with co-defendant Kenneth Lawson, and from witness Donald Bennett that Murr was incarcerated. However, the district court instructed the jury to disregard these remarks, which abated any prejudice.

E. Competency of Jerry Parks and Tommy McKeehan

Whited claims that witnesses Jerry Barks and Tommy McKeehan were incompetent to give testimony on grounds of mental incapacity. In the case of Parks, he had previously been found incompetent to stand trial, had a history of auditory delusions, and had spent time in mental health facilities. As for McKeehan, Whited cites an affidavit filed with the district court by his treating psychiatrist that he could not assist his counsel in an upcoming trial because he suffered from "confusion, agitation, paranoia and hallucinations." This affidavit was dated four days prior to McKeehan having entered into a plea agreement with the government. Because of such information, Whited contends that, at the very least, it was error for the court not to conduct a preliminary examination of Parks' and McKeehan's competency as witnesses.

Under Rule 601 of the Federal Rules of Evidence (General Rule of Competency), "[e]very person is competent to be a witness except as otherwise provided in

these rules." The Advisory Committee Notes to Rule 601 explain that "[t]his general ground-clearing eliminates all grounds of incompetency not specifically recognized in the rules of this Article." Accordingly, "[n]o mental or moral qualifications for testifying as a witness" are specified. *Id.* This is because "[s]tandards of mental capacity have proved elusive in actual application." *Id.*

Thus, the Federal Rules of Evidence strongly disfavor barring witnesses on competency grounds due to mental incapacity. As we wrote in *United States v. Ramirez*, 871 F.2d 582, 584 (6th Cir.), *cert. denied*, 493 U.S. 841, 110 S.Ct. 127, 107 L.Ed.2d 88 (1989):

> What must be remembered, and is often confused, is that "competency" is a matter of status not ability. Thus, the only two groups of persons specifically rendered incompetent as witnesses by the Federal Rules of Evidence are judges (Rule 605) and jurors (Rule 606). The authority of the court to control the admissibility of the testimony of persons so impaired in some manner that they cannot give meaningful testimony is to be found outside of Rule 601. For example, the judge always has the authority under Rule 403 to balance the probative value of testimony against its prejudicial effect. Similarly, under Rule 603, the inability of a witness to take or comprehend an oath or affirmation will allow the judge to exclude that person's testimony. An argument can also be constructed that a person

> might be impaired to the point that he would not be able to satisfy the "personal knowledge" requirement of Rule 602. Again though, it is important to remember that such decisions by a trial judge to either admit or exclude testimony will only be reversed for a clear abuse of discretion.

(Footnote omitted.)

The district court did not rule on Parks' competency before he took the stand; later, in considering a motion for judgment of acquittal, the court indicated that Parks and McKeehan "were not crazy witnesses." Likewise, it addressed the question of McKeehan's mental capacity during a bench conference held after he had begun to testify. The court stated that it had "observed Mr. McKeehan, and he appears to the Court to be sober, cogent. He appears to the Court to know exactly where he is and what he is doing. His testimony has been direct, and his testimony has not been confused." When pressed concerning the psychiatrist's affidavit that McKeehan could not help in his own defense, the court opined that "he sure has made a remarkable recovery . . . [His condition is] fodder for cross-examination, and it would appear that either the psychiatrist made an inaccurate diagnosis September the 5th or the witness has made a remarkable recovery. And the Court observes that -- repeats that he does not appear to be confused today."

At a hearing on defendants' post-trial motions, the district court supplemented its findings regarding Parks' and

McKeehan's competency, and the need for a special examination of their mental faculties. The court noted that

> one of the reasons I overlooked stating as to my belief that an independent evaluation at this time would be a waste of time is that -- is that such a finding, even if they found that they were incompetent here in April of 1992, would not be dispositive as to their competence or mental state when they testified in September of 1991 at the trial of this case or at the hearings that we held in August.
>
> . . . .
>
> Similarly, even if I had such an opinion from a psychiatrist or psychologist or whoever that gave us an independent opinion that these people were -- Mr. Parks and McKeehan were total screwballs, I would -- I would find those opinions to have little probative value and of little weight, and I would not -- I would not accept them as being -- as being conclusive on the matter. And I would not let such opinions override my own judgment after having seen -- personally witnessed their performance in court.

Hence, the district court did not find that Parks and McKeehan were incapable of understanding their oath and obligation to testify truthfully. Nor did the court find, based n its observations that their mental abilities were so limited hat they did not have sufficient capacity to perceive

events, remember them, and to describe them for the benefit of he trier of fact. *See* Fed.R.Evid. 602. The court was not required, as Whited would have it, to conduct a special examination into their competency. If either Parks' or McKeehan's behavior raised concerns stemming from Rule 602 or 603, it could have excluded their testimony (or portions hereof) without any examination whatsoever. Furthermore, he court had the additional authority, pursuant to Rule 403, to exclude their testimony in light of their past or present Dental state. The court chose not to take any of these measures in the circumstances. Instead, it permitted defense counsel to use the psychiatric records of Parks and McKeehan, as well as other indicia of their mental capacity, to vigorously attack their credibility.

After carefully reviewing the record, we conclude that the district court did not abuse its discretion in doing so. As long as a witness appreciates his duty to tell the truth, and is minimally capable of observing, recalling, and communicating events, his testimony should come in for whatever it is worth. It is then up to the opposing party to dispute the witness' powers of apprehension, which well may be impaired by mental illness or other factors. As we are persuaded that Parks and McKeehan were at least minimally capable of offering reliable evidence, the possible weaknesses in their testimony went to its credibility, and so were to be assessed by the jury. *See United States v. Moreno*, 899 F.2d 465, 469 (6th Cir. 1990).

Whited also argues that defendants should have been allowed to introduce the psychiatric records of Parks and McKeehan as substantive evidence. They were ruled inadmissible hearsay by the district court. Whited alleges, however, that they were not put forward for the truth of the matters asserted within, but to show how manipulative Parks and McKeehan could be if they were not, in fact, mentally unbalanced. Such use of the records during cross-examination to challenge Parks' and McKeehan's credibility was appropriate. However, we believe that they would have constituted hearsay if employed as part of a substantive defense. They would have to have been offered to show that the psychiatrists making the records actually concluded that Parks and McKeehan were mentally ill. Otherwise, Parks' and McKeehan's deception would have no basis in fact. Consequently, the district court did not err in declining to admit the psychiatric records.

F. Restriction on Cross-Examination of Government Agent

Finally, Whited asserts that the district court improperly limited defendants' cross-examination of a government witness, Special Agent Clyde Merryman of the FBI. Defense counsel sought to question Merryman about an internal disciplinary investigation that had been resolved in his favor. After a sealed hearing outside the presence of the jury, at which the court placed Merryman under oath and interrogated him about the alleged misconduct, it

determined that defendants would be restricted from inquiring into the investigation on cross-examination. Having reviewed the transcript of the hearing and the sealed materials contained in the record, we conclude that the district court did not commit an abuse of its discretion in this regard.

Rule 608(b) of the Federal Rules of Evidence (Evidence of Character and Conduct of Witness -- Specific instances of conduct) provides in part that

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

"The first step in a 608(b) analysis is whether the specific conduct is probative of the witness' character for truthfulness or untruthfulness." *United States v. Hill*, 550 F.Supp. 983, 990 (E.D.Pa. 1982), aff'd, 716 F.2d 893 (3rd Cir.1983), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984). Here, Merryman was not disciplined following the investigation into his conduct, so it had little worth as a challenge to his credibility. Whatever probative value might have attached to the FBI's proceedings was substantially outweighed by prejudice to the government. *See* Fed.R.Evid 403.

IV

Robert Phibbs

A. The Voir Dire

Phibbs argues that the district court violated Rule 24(a) of the Federal Rules of Criminal Procedure by refusing to submit a questionnaire developed by defendants to prospective jurors, when the court itself conducted the voir dire of the jury venire.

Except for Robert Murr, defendants waived their respective interests in examining the jury venire. According to Phibbs, the other defendants entrusted Murr with undertaking the voir dire to attempt to balance their right to an impartial jury with the district court's concern for expediency. Such a strategy appears to have been partially the result of defendants' fears that the court was leaning towards exclusively examining prospective jurors, and was an effort to devise an alternative procedure more desirable to them. If so, their sense of the court's inclination proved to be accurate.

Rule 24(a) of the Federal Rules of Criminal Procedure (Trial Jurors— Examination) states:

> The court stray permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such

> further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Thus, the trial court nay resolve to conduct the voir dire o' its own. If the court does so, it may also ask the jury venire other appropriate questions suggested by the parties.

In reviewing the district court's handling of the voir dire it the case at bar, we must ascertain whether the court "abuser the broad discretion vested in him by the rulings of the Supreme Court of the United States in his impaneling of [the jury." *United States v. Blanton*, 719 F.2d 815, 822 (6th Cir.1983), *cert. denied*, 465 U.S. 1099, 104 S.Ct. 1592, 80 L.Ed.2d 125 (1984). A trial court "retains great latitude in deciding what questions should be asked on voir dire.' *Mu'Min v. Virginia*, __ U.S. __, __, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493 (1991). So long as the court ensured that the defendant or defendants had "a fair trial by a panel of impartial, 'indifferent' jurors", reversal is not mandated. *Irvin v Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1960).

In its examination of the jury venire, the district court drew upon the substance of the questions presented by defense counsel. As the voir dire progressed, the court held bench conferences to address areas of concern highlighted by defendants. At its conclusion, the court asked whether there were any other questions from counsel, eliciting no response.

The district court examined the panel members as a group concerning the presumption of innocence, the meaning of reasonable doubt," their knowledge of the parties and attorneys, and their knowledge of the case. They were also asked about their impressions of the criminal justice system, any predispositions they might have regarding drug prosecutions, whether any of them had prior experience as a juror, whether any of them had been a victim of crime, and whether they could set aside their personal feelings in rendering a verdict. All of these questions, and others, served to establish that the individuals who were ultimately selected as jurors were unbiased.[2]

Phibbs suggests that the written questionnaire created by defendants was necessary to ferret out those prospective jurors chose biases would not be revealed through a collective examination.[3] An individualized examination of the jury venire s not, however, required by the United States Constitution. *See Mu'Min*, __ U.S. at __, 111 S.Ct. at 1904. Much of the questionnaire was directed at the personal habits and activities of the panel members (*e.g.*, what books they read, chat television shows they watched, etc.). While such information might have aided defendants in identifying sympathetic jurors, it was not need to

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[2]In addition, the district court permitted defendants to utilize a total of 26 peremptory challenges.

[3]Each member of the jury venire did fill out the official juror's questionnaire form.

compose a fair-minded jury. Accordingly, we hold that the district court did not abuse its discretion in its management of the voir dire.

Phibbs claims nonetheless that considering the length of the trial was estimated at one month, "a one and one-half voir dire examination was so grossly inappropriate that a fair and impartial jury could not have been seated after such questioning." However, he does not cite any instance of prejudice relative to the jury as a body or to any specific juror. Nor does he point out any question that the court failed to ask that harmed defendants. As a result, we find his contention to be without merit.

B. The Presence of Government Agents in the Courtroom

Phibbs also asserts that defendants did not receive a fair trial because FBI Special Agent Clyde Merryman and DEA Special Agent Frank Finken, both of whom appeared as witnesses, were allowed to remain in the courtroom throughout the proceedings.

Rule 615 of the Federal Rules of Evidence (Exclusion of Witnesses) provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. The rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a

> natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

In the instant case, the government sought to designate both Merryman and Finken as its representatives during the trial. After a defense objection, the district court replied:

> I think the rule provides that anyone that was necessary to assist counsel in the presentation of the case would be -- would be permitted to remain in the courtroom. Inasmuch as this is an extended trial, boxes of documents both from the Eastern District of Kentucky and the Eastern District [of] Tennessee, it would be unduly burdensome on the Court and time consuming if we just had one case agent. So the request of the Government is not unreasonable, so the motion is overruled.

The court then engaged in a colloquy with one of the counsel for the defense, inviting him to bring contrary authority to its attention before any witnesses were called. Counsel did not do so.

Hence, the court initially treated both Merryman and Finken as "essential" witnesses under Rule 615(3). Later, however, the court requested that the government designate one of the two as its representative pursuant to Rule 615(2); it would then consider whether the other agent was an "essential" witness. The government responded by selecting

Merryman as its representative, and the court found that Finken's presence in the courtroom was also needed for the government to effectively present its case.

Phibbs concedes that one of the agents could have stayed in the courtroom, despite the fact that he would later testify. However, he argues that the government had the burden to show that the presence of more than one agent was "essential" to it laying out its case. *See* Fed.R.Evid. 615.

The district court followed our procedure, as set out in *United States v. Pulley*, 922 F.2d 1283 (6th Cir.), *cert. denied, Pulley v. United States*, __ U.S._ _, 112 S.Ct. 67, 116 L.Ed.2d 42 (1991), to be used when the government seeks to have two agent-witnesses in the courtroom for assistance. Rule 615(2) affords the government the right to designate only one representative for such a purpose. *Id.* at 1286. However, certain prosecutions may be complex enough that the aid of more than one law enforcement officer is needed to sort through extensive, technical evidence, and to help "map out strategy." *See United States v. Martin*, 920 F.2d 393, 397 (6th Cir. 1990). When the government wants to have two agent-witnesses in attendance throughout a trial, "it is always free to designate one agent as its representative under subpart (2) [to Rule 615] and to try to show under subpart (3) that the presence of the second agent is "essential" to the presentation of its case." *Pulley*, 922 F.2d at 1286.

Demonstrating that an additional agent[4] is, in fact, "essential" is no easy task. Criminal defendants, as do all persons caught up in the legal process, have a substantial interest in "discouraging and exposing fabrication, inaccuracy, and collusion" related to in-court testimony. Advisory Committee Notes to Fed.R.Evid. 615. This interest was recognized in the text of Rule 615, which made the exclusion of witnesses by the parties a matter of right, subject to exceptions that are narrowly defined.

The "essential" witness exception set out in Rule 615(3) "contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." Advisory Committee Notes to Fed.R.Evid. 615. We are persuaded that Finken fell within this category due to the particular circumstances of the case at bar. This was a trial that was scheduled for approximately one month, involving several defendants and a great deal of evidence, not all of which was readily accessible. After Merryman was designated the government's representative in accordance with Rule 615(2), the court determined that Finken, who was intimately familiar with portions of the evidence, was also needed to advise the government in its handling of the prosecution. As Merryman and Finken were, for the most

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[4]Unlike Fed.R.Evid. 615(2), Rule 615(3) does not restrict the number of witnesses who may be deemed "essential to the presentation of [a] party s cause."

part, responsible for distinct aspects[5] of a far-flung investigation, this was not an abuse of discretion.

We note that the district court took steps to guarantee that Merryman and Finken would not parrot each other's testimony. It directed that, when one of them was on the stand, the other was to be outside the courtroom. Such a measure could be taken, not only on the basis of the court's inherent powers of trial oversight, but also in reliance upon Rule 615 itself. *See, e.g., United States v. Womack*, 654 F.2d 1034 (6th Cir. 1981), *cert denied*, 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982) (breach of conditions placed on sequestration constitutes violation of Fed.R.Evid. 615).

Phibbs, however, asserts that government counsel really wanted Finken and Merryman in court so that they might be in a position to coach Parks during recesses, or to otherwise guide his testimony. He claims that defendants were prejudiced because Merryman had substantial contact with Parks, "and the clear purpose and effect of allowing Agent Merryman to remain in the courtroom was to be able to listen to all of the testimony and to, in fact, cumulatively correct any questionable credibility problems and to bolster the credibility of Mr. Parks[.]" As for Finken, he "also had the opportunity to sit through this testimony and assist Agent Merryman in the 'correction' of Mr. Parks'

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[5]Finken was the case agent in Kentucky, while Merryman was stationed in Tennessee.

testimony." Phibbs offers nothing to support his charges, and we find them to be rank speculation.

Despite the possibility of improper influence, Rule 615(2) allows the government to have any law enforcement officer it wants at its counsel table. Similarly, Rule 613(3) does not categorically bar any class of agents from assuming "essential" witness status. Ordinarily, if there are concerns about coaching by an agent-witness, the court may order him not to discuss the case with any other witness. If the agent fails to adhere to such an order, the court has a variety of remedies at its disposal, ranging from commenting on the transgression to the jury, to holding the agent in contempt, or disqualifying him as a witness, or even declaring a mistrial.

In addition, the defense is free to cross-examine both the agent-witness and the alleged object of his coaching efforts, subject to the control of the court. *See Geders v. United States*, 425 U.S. 80, 89-91, 96 S.Ct. 1330, 1335-36, 47 L.Ed.2d 592 (1976). *See also* M. Graham, Federal Practice and Procedure: Evidence § 6611 at 217-221 (West 1992). Here, defendants engaged in spirited cross-examination of Parks, Merryman, and Finken, touching upon the question of coaching.

C. Sufficiency of the Evidence

Phibbs next contends that the evidence underlying his convictions was insufficient, and that the district court erred in denying both his motion for a directed verdict

following the government's case-in-chief, and his subsequent motion for judgment of acquittal.

Phibbs was convicted of conspiracy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846), as well as on nine counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2).

Jerry Parks testified that Phibbs, an employee of Robert Murr's, wrote a letter to the United States Probation Office in Memphis, Tennessee, stating that he would employ Parks if he was transferred to Knoxville. Phibbs sent the letter on behalf of Murr because Murr was under investigator by authorities in Knoxville. Their efforts were successful, and Parks was given permission to work for Automotive Enterprises, one of Murr's companies. After Parks began his tenure there, Phibbs represented to Parks' probation officer that he was on the job. However, according to Parks, his employment was a "sham" and "[he] didn't do anything there at Automotive Enterprise other than carrying on Mr. Murr, the Chiefs, cocaine business." Phibbs sometimes paid Parks with "sham" checks, which he would then cash, returning the money to Phibbs to put back in the account.

After Parks began supplying Murr's cocaine customers with the drug, he often gave Phibbs the money he collected from them if Murr was unavailable. This was done on Murr's express instructions, so that Parks would

not be carrying large sums on his person. The amount turned over to Phibbs would frequently be in the neighborhood of $10,000 to $15,000.

When, after November of 1988, Murr decided to move the location of the cocaine stash from the house he rented for defendant Diane Whited, he told Parks to bury the drugs inside a pipe on a hillside behind Automotive Enterprises. Parks testified that the only other person "in the world" who knew where the cocaine was subsequently hidden was Phibbs. This was so that, in the event Parks was arrested or injured, "somebody in our organization. . . would know."

Ernie Nicely, a business partner of Murr's, stated that on two occasions when defendant Kenneth Lawson came to see Murr at Anderson County Auto Auction, ostensibly to discuss matters related to the cocaine conspiracy, Phibbs was "on the property." This was unusual because "[h]e very seldom came out there"; it was 20 miles away from Phibbs' job at Automotive Enterprises. On the last day that Nicely saw Lawson, August 17, 1989, Murr called him and asked him to take two suitcases out of the safe at Anderson County Auto Auction and to deliver them to Phibbs at Automotive Enterprises.

Later, in September of 1989, Murr told Nicely that defendant Edward Rogers owed him $2,000, and that Phibbs was to deduct that amount from the $10,000 that he was holding for Rogers. According to Nicely, Rogers owed the money "for drugs or something." Around that time,

Murr instructed Nicely to "get rid of" a 1984 Porsche 940 that was on Murr's property until he could get a title for it. Phibbs informed him that Murr had obtained the car in exchange for a kilogram of cocaine. When he titled the Porsche in his own name, Phibbs furnished the money to pay the tax.

Rogers' statements at trial corroborated those of Parks and Nicely regarding Phibbs' participation in the drug distribution ring. He confirmed that he owed Murr $2,000 for drugs, and that he went to Phibbs to settle his account. Phibbs claimed that he actually owed $4,000 for four ounces of cocaine. During their conversation, Rogers asked Phibbs if he was "still in business," and Phibbs replied in the affirmative.

All of this testimony was buttressed by the government's introduction of records demonstrating that calls were made from Murr-related telephones to Phibbs' residence, his beeper, or to Whited's cellular phone, which was listed in his name, during the periods delineated in the distribution counts.

Viewing the evidence in the light most favorable to the government, there was sufficient proof from several sources that Phibbs "knew of, intended to join and participated in" the charged conspiracy. *Pearce*, 912 F.2d at 161 (6th Cir.1990) (quoting *United States v. Staidest*, 765 F.2d 1224, 1237 (5th Cir.1985)). He received and processed drug motley, helped install Parks as a middleman, and was part of the security surrounding the cocaine stash.

As for the distribution counts, Parks' testimony, in particular, indicated that Phibbs handled drug money during the relevant tinge frames. This contention must therefore be rejected.

D. "Minimal" v. "Minor" Participation; Acceptance of Responsibility

Phibbs further argues that, at sentencing the district court should have accorded hind a four-point reduction in offense level, attendant to a finding that he was a "minimal" participant in the drug ring, rather than a two-point reduction for being a "minor" participant. He also asserts that he was entitled to a two-point reduction for acceptance of responsibility.[6]

A district court's factual decisions, such as those related to a defendant's acceptance of responsibility, or his role in the offense, are reviewed under the clearly erroneous standard. *United States v. Perry*, 908 F.2d 56, 58 (6th Cir.1990). To be clearly erroneous, "'a decision must strike

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[6]Since all appropriate arguments of one defendant have been adopted by the other defendants, the government assumes that Huckelby and Whited joined in Phibbs' argument concerning acceptance of responsibility, and that Huckelby joined in his argument regarding a sentence reduction for minimal participation in concerned activity. We do not make such an assumption, since these issues are largely fact-specific and are not common to the group.

us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Id.* (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988), *cert. denied*, 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989)).

Application Note 1 to United States Sentencing Guidelines § 3B1.2 (Mitigating Role) status in part that: "Subsection (a) [dealing with minimal participants] applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." With this language in mind, Phibbs latches onto the probation officer's conclusion in his presentence report that "Phibbs gives the appearance, amid all of the co-defendants to be least involved in the group" to contend that he should have been considered a minimal participant. He further claims in this regard, that he did not have "organizational, managerial or monetary interests in any of the trips to Kentucky to buy cocaine."

However, Applications Note 2 to U.S.S.G. § 3B1.2 underscores that:

> It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug snuggling operation than to offload part of a single marihuana shipment, or in a case where an

> individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

The district court, in passing sentence, felt that Phibbs was not merely on the fringes of the drug distribution ring:

> You knew what the deal was, you knew what the deal was front beginning to end. And I really believe that and I infer you were into it deeper than what the United States was able to prove. The ostrich defense is not applicable in cases like this.

In comparing the roles of Whited, whom it considered to be a minimal participant, and Phibbs, the court took Whited's dependence on Murr and the fact that, unlike Phibbs, she was not a repository of drug money to be significant. In its view, these factors placed her "below Phibbs" for sentencing purposes.

Our examination of the record convinces us that Phibbs was not the sort of marginal player that the United States Sentencing Commission and Congress conceived of as a minimal participant. He was involved in the drug distribution ring throughout the bulk of its existence having been entrusted with drug-related funds, as well as critical knowledge concerning the whereabouts of the cocaine supply. Consequently, the district court's conclusion as to his role in the enterprise was not clearly erroneous.

Phibbs further contends that he should have been granted a reduction in offense level for acceptance of

responsibility, pursuant to U.S.S.G. § 3E1.1. In a statement furnished to the district court, Phibbs acknowledged that he was aware, or should have been aware, that he was given money that was the product of Murr's cocaine clears. Once Murr was arrested, it became clear to him that the money was, in fact, drug related. Thus Phibbs avers that he "truthfully admitte[d] the conduct comprising the offense(s) of conviction." Application Note 1(a) to U.S.S.G. § 3E1.1.

However, the district court was not so sure. It told Phibbs' counsel that "I have read his statement, and I don't think that the statement even comes close to a contrite heart and acceptance of responsibility." Accordingly, the court denied Phibbs' request for a sentence reduction under U.S.S.G. § 3E1.1.

We approve of the court's decision. Phibbs' did not even begin to address the scope of the charges on which he was convicted. To the extent that he did, he did not do so in good faith. There was evidence that he understood all along he was collecting tainted money, and that he was enlightened with respect to the magnitude of the drug distribution ring. Rogers' testimony indicated that he continued his criminal conduct after Murr was arrested. In no way did he assist law enforcement authorities in their probe of the ring's activities. Hence Phibbs could not be said to have accepted responsibility for his offenses in a manner contemplated by the federal sentencing guidelines.

V.

Victor Rojas

A. The Government's Use of Grand Jury and Administrative Subpoenas

Rojas contends that the district court erred in allowing the government to employ administrative subpoenas to uncover evidence without a finding of probable cause that a crime had taken place. He also claims that the government abused the grand jury subpoena power by using it to gather additional evidence. In support of the previously-returned indictment.

After Rojas was arrested on January 9, 1991, he was informed that a sealed indictment had been returned against him on May 2, 1990. His counsel filed motions for discovery, and inspection, and received materials including Rojas' telephone records, and those of defendants Kenneth Lawson and Mary Lawson. These records had been subpoenaed after the May 1990 indictment. In addition, his attorney was provided with Rojas' credit card statements, subpoenaed on January 17, 1991, defendant William Baird's telephone records, ordered subpoenaed on June 19, 1990, as well as other items.

Rojas subsequently moved to dismiss the indictment based upon the government's alleged abuse of the grand jury subpoena power. He argued that the government improperly utilized this power to obtain materials to supplement the indictment already handed down. The district court denied Rojas' motion after a hearing at which

the government represented that the materials in question were secured by way of DEA administrative subpoenas, not grand jury subpoenas.[7] At trial, Rojas, joined by his co-defendants, objected to such subpoenas having been being employed without demonstration of probable cause before a neutral magistrate.

Pursuant to 21 U.S.C. § 876(a) (Subpoenas—Authorization of use by Attorney General):

> In any investigation relating to his functions under this subchapter with respect to controlled substances . . . the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation.

The Attorney General may, delegate this power to special agents in charge of those criminal investigations covered by the statute. *United Stated v. Hossbach*, 518 F.Supp. 759, 765-66 (E.D.Pa.1980) (citing 28 C.F.R. Subpart R. Appendix § 7(a)). The sorts of items that are capable of being procured as a result plainly include the records presently in controversy. *Id.* at 767 (telephone records);

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[7]Our review of the record confirms that the subpoenas in controversy were, indeed, administrative subpoenas. Accordingly, we need not address Rojas' grand jury-related argument.

United States v. Mountain States Tel. & Tel. Co., 516 F.Supp. 225 (D.Wyo.1981) (telephone records).

Once a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial. *United States v. Breitkreutz*, 977 F.2d 214, 217 (6th Cir.1992). It may, however, continue to employ the grand jury process as part of an ongoing investigation, possibly leading to further charges against the subject of the former indictment. *Id.* Section 876 of title 21 simply furnishes the Attorney General and his delegates with an alternative mechanism for carrying on the investigation. However, unlike the grand jury system, it may also be used to discover evidence related to the charges in the original indictment.[8]

Recipients of administrative subpoenas, such as those issued in accordance with 21 U.S.C. § 876, are afforded certain protections under the Fourth Amendment to the United States Constitution. The subpoena has to be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance [would] not be unreasonable." *See v. City of Seattle*, 387 U. S. 541, 544, 87 S. Ct. 1737, 1740, 18 L. Ed.2d 943 (1967).

If it is a subpoena duces tecum, the government does not have to secure a judicial warrant before service is

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[8]It is also distinct from Rule 17(c) of the Federal Rules of Criminal Procedure (Subpoena—For Production of Documentary Evidence and of Objects).

effectuated. Nonetheless, "the subpoenaed party [must be able to] obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 545, 87 S.Ct. at 1740. *See also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415, 104 S.Ct. 769, 773, 78 L.Ed.2d 567 (1984).

Should an on-premises search and inspection be required to execute the subpoena, a valid search warrant is needed as a condition precedent if consent is not forthcoming. If, as in the instant case, the subpoena is to be based upon 21 U.S.C. § 876, "and the purpose behind the search [is] . . . a quest for evidence to be used in a criminal prosecution," a full probable cause showing is mandatory.[9] *United States v. Lawson*, 502 F.Supp. 158, 165 (D.Md. 1980). *See also Michigan v. Tyler*, 436 U.S. 499, 508, 512, 98 S.Ct. 1942, 1949, 1951, 56 L.Ed.2d 486 (1978). A showing which only comports with "reasonable legislative or administrative standards", as when regulatory non-compliance is suspected, will not suffice. *See Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). *See also Marshall v. Barlow's Inc.*, 436 U.S. 307, 320, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305

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[9]In such a context, the reasonableness of giving the warrant without advance notice to the subject and an opportunity to be heard is to be analyzed consistent with those Fourth Amendment principles applicable to criminal warrants.

(1978) ("Probable cause in the criminal sense is not required" to undertake administrative search aimed at uncovering civil violations of the Occupational Health and Safety Act).

Here, the administrative subpoenas were not directed at Rojas, but rather at third party businesses. As a consequence, he did not have standing to dispute their issuance on Fourth Amendment grounds, unless he could demonstrate that he had a legitimate expectation of privacy attaching to the records obtained. *See, e.g., United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is evident, however, that Rojas did not have both an actual and a justifiable privacy interest in any of these materials, including his credit card statements and telephone records. *See Smith v. Maryland*, 442 U.S. 735, 742, 99 S.Ct. 2577, 2581, 61 L.Ed.2d 220 (1979) (in case involving pen register, the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial"); *United States v. Miller*, 425 U.S. 435, 440-41, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976) (records of bank transactions were not "private papers," over which a person could claim ownership or possession, but were business records). The information contained within them was readily accessible to employees during the normal course of business. Rojas therefore lacked

standing to challenge the government's use of the subpoenas.[10]

The situation would not have been different if the government had infringed upon the constitutional rights of those entities subpoenaed. One generally does not have standing to complain about the breach of another's rights. *See, e.g., Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As it happened, none of the parties subpoenaed was opposed to turning over the requested items.

B. Motion in Limine Related to Rojas' Colombian Origins; Motion For Mistrial Based Upon References to Rojas' Colombian Ties

Rojas further asserts that the district court should have granted his motion in limine to prohibit the government from mentioning his having been born in Colombia, or from introducing his passport records, which revealed that he had journeyed to Colombia several times, ostensibly to visit relatives, in the three to five years prior to his arrest.[11]

Rojas also argues that a mistrial was warranted because of inflammatory references that were made concerning his connections to Colombia. In his view, they

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[10]Rojas, co-defendants mere likewise devoid of standing.

[11]At the time of his arrest, Colas was a loyal alien residing in New Jersey.

were gratuitous and were designated both to arouse ethnic bias and to tap into the jury's presumed eagerness to combat the national drug crisis, including by way of a misguided verdict. *See United States v. Sullivan*, 937 F.2d 1146, 1153-54 (6th Cir.1991) (urging jury to "strike a blow to the drug problem" was "harmful to the constitutional right to a fair trial"); *United States v. Doe*, 903 F.2d 16, 25 (D.C.Cir. 1990) (appeals to racial passion affected jury impartiality). He cites three such references aside from those adverted to regarding his motion in limine.

First, the government was allowed to call a federal prisoner, Andres Tealdo, as a witness and to ask him leading questions. This led Tealdo to testify that he knew Rojas in 1989, and that Rojas told him that he sold cocaine from Colombia. Second, the government stated during its closing argument that "Robert Dale Murr could pick up a telephone and arrange for his cocaine broker, the Defendant Kenneth Lawson, to have a Columbian drug dealer, Victor Rojas, bring him kilogram quantities of cocaine by Kentucky by a phone call." Lastly, on cross-examination, Jerry Parks referred to Rojas on one occasion as "Victor Manuel Noriega Rojas." While not a direct reference to this background Rojas claims that, by implication, it drew attention to his ties to Colombia, a country commonly understood to be a hub in the international drug trade.

Motions in limine to exclude evidence are reviewed for an abuse of discretion. We detect no such abuse in the instant case. That Rojas had ties to Colombia and travelled

there frequently was relevant to the government's contention that he was the cocaine supplier in the charged conspiracy. We believe that, as proffered for such a legitimate purpose, the complained-about evidence was not unduly prejudicial. *See* Fed.R.Evid. 403.

The denial of a mistrial motion is also assessed under the abuse of discretion standard. *Moore*, 917 F.2d at 220. Before Tealdo took the stand, the district court and counsel held a lengthy bench conference, during which they discussed the implications of his anticipated evidence. The government expected that Tealdo's testimony would be that Rojas admitted to him that he was a drug dealer whose cocaine source was in Colombia. Significantly, defense counsel objected only on the grounds that this would constitute irrelevant and prejudicial evidence of other "bad acts," relying upon Rule 404(b) of the Federal Rules of Evidence. We are of the opinion that it was properly allowed in and was not, in fact, inflammatory. As a consequence, the portion of the government's closing argument about which Rojas complains had a basis in evidence.

As for Parks' calling him "Victor Manuel Noriega Rojas," Rojas suggests that this was harmful because General Noriega's highly-publicized drug trial was underway in Florida at the same time as the instant proceedings. While such a reference was inappropriate, it was an isolated remark and we are satisfied that it did not deprive him of a fair trial. *See Bowers*, 739 F.2d at 1055.

Accordingly, the district court did not err in denying Rojas' motion for a mistrial.

C. The Rojas "Photospread"

Rojas also alleges that only after the government's examination of witness Vivian Cummins did he first become aware that she had been shown a "photospread" containing his picture as part of her pretrial identification of him. He contends that this violated his right under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 I,.Ed.2d 215 (1963), and its progeny to any exclupatory or impeachment evidence held by the government.

The record indicates that Rojas did request such so-called "Brady evidence" in the proper fashion. At side bar, the government averred that defense counsel had been provided with a copy of the photospread "before Ms. Cummins even hit the stand." Whether this was so, we are persuaded that Cummins had a sufficient basis for her pretrial identification of Rojas, independent from any refreshment provided by the photospread. As a result, Rojas' timely mistrial motion need not have been granted.

D. The Confidential Presentence Information

Rojas, on behalf of his co-defendants, next asserts that the district court erred in allowing confidential presentence information to be submitted by the United States Probation Office without affording him an inspection

of the materials, and an opportunity to comment as to their import.

At a hearing where sentencing matters were discussed, defense counsel asked whether the district judge had any confidential presentence information in his possession. The judge indicated that he did, but maintained that it was not the sort of material he was obligated to divulge:

> [A]ny information that I may get, directly indirectly, from the probation officer independent of the presentence report of a confidential nature . . . is solely--if any information that I received from the probation office, directly or indirectly, is for my illumination and my consideration, and it would not be of any--any use or benefit to you or the defendant at all. And that information is exempt.

The district judge then overruled counsel's motion, made in accordance with Rule 32(c) (3) (B) of the Federal Rules of Criminal Procedure, for a summary of the confidential information.

The information in question was placed under seal, and we examined it. It consisted of nothing more than the probation officer's sentencing recommendations concerning defendants. Pursuant to Fed.R.Crim.P. 32(c)(3)(A), such recommendations are not required to be disclosed to the accused. Consequently, the district court did not withhold any sentencing information that defendants were entitled to examine.

E. Acceptance of Responsibility

Finally Rojas argues that he should have been given a two point reduction in offense level under the federal sentencing guidelines for acceptance of responsibility. Rojas asserts that he offered to plead guilty and to acknowledge that he conspired to distribute, and did distribute, the amount of cocaine charged in the indictment. However, according to his attorney, there was a dispute with the government "over Mr. Rojas' remembrance or memory of what quantities came down here on a certain date, and Mr. Parks and Mr. McKeehan's memory." As a result, the government would not enter into a plea agreement with Rojas, and he subsequently went to trial.

Rojas claims that, in spite of his desire to admit his wrongdoing, his offense level was not lowered because he did not, in fact, plead guilty. Consequently, he contends that he was penalized for exercising his right to a trial as guaranteed by the Sixth Amendment to the United States Constitution.

Section 3E1.1 of the sentencing guidelines (Acceptance of Responsibility) does not inflict an across-the-board penalty upon those defendants who go to court to contest their prosecution. Application Note 2 to the section plainly provides that:

> Conviction by trial . . . does not automatically preclude a defendant front consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his

> criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

It is well-established that a penal scheme which extends a benefit to defendants who own up to their conduct does not unconstitutionally burden those who exhibit no remorse. *See, e.g., Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). A plea of guilty is an indication of contrition, so it is not surprising that "leniency is more often granted to defendants who accept responsibility by pleading guilty." *United States v. Saunders*, 973 F.2d 1354, 1362 (7th Cir.1991), *cert. denied*, ___ U.S.___, 113 S.Ct. 1026, 122 L.Ed.2d 171 (1993).

The record reveals that Rojas' acceptance of responsibility was not unconditional; he was keenly interested in securing a plea agreement. Rajas' counsel stated explicitly that "because of my understanding that the United States cannot give him any assurance that he will not be prosecuted in any other district, then he is not pleading guilty . . . I want to state on the record that he is willing to plea, except for the Government said they would

not promise to prosecute him in any other districts." He also complained that the government "[was] not willing to cut [Rojas] one iota" as part of a bargain because, in his view, Rojas' testimony might not resonate with that of Parks and McKeehan. Notwithstanding Rojas' equivocation, the district judge told him that he would "take ... into account" his alleged readiness to concede his culpability. The court need not have done so; that it did demonstrates that its failure to give Rojas an offense level reduction under section 3E1.1 was not punishment for his having stood trial.

However, the court ultimately felt that Rojas' refusal to testify against his co-defendants, which may have resulted in the acquittal of one of them, and to adequately divulge information about his superiors in his cocaine supply network was significant. The district court's findings concerning a defendant's acceptance of responsibility for his offense are not to be reversed unless clearly erroneous. *Perry*, 908 F.2d at 58. "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." Application Note 5 to U.S.S.G. § 3E1.1. Applying such a standard here, we do not believe the district court's particular conclusion as to Rojas was improper.[12]

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[12]Although Rojas has joined in the arguments of the other defendants, we do not consider Rojas to have challenged the

VI.

Robert Murr

A. The Plea Agreement

Murr claims that his convictions should have been dismissed by the district court because he had entered into an earlier plea agreement with the government in the Eastern District of Tennessee. Murr contends that the terms of this agreement precluded his prosecution in the case at bar.

On August, 17, 1989, Murr was arrested in Knoxville, Tennessee, and was later indicted for cocaine distribution and for using a telephonic device to facilitate such distribution. In January of 1990, Murr agreed in writing to plead guilty to the distribution charges in exchange for the government moving to drop the remaining counts of the indictment at sentencing. The agreement provided in part that:

> If the defendant complies with the terms of this agreement, the United States will not further charge the defendant in the Eastern District of Tennessee for those non-tax-related offenses of which it presently has knowledge. It is further agreed that the defendant will not be prosecuted in the Northern

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sufficiency of the evidence supporting his convictions. Such a contention is generally unique to any given defendant. As it is not our function to craft an appellant's arguments, he may not simply "join" the briefs of his co-defendants on this issue.

> District of Georgia for any non-tax-related offenses concerning actions involving Bobby Joe Wilson.

The last paragraph of the agreement underscored that:

> The Parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilt to the above-referenced charges, and that there are no other agreements, promises, undertakings or understandings between the defendant and the United States.

In his motion for dismissal, Murr asserted that the promise that he would not be prosecuted in the Eastern District of Tennessee or in the Northern District of Georgia was actually meant to signify a global resolution of his criminal exposure. He based this assertion on purported representations by government counsel to this effect. Furthermore, according to Murr, it was logical that such was the intention of the parties because the only investigations of his activities known to be underway were in those districts. His counsel supposed that it would not have been reasonable for him to demand that the United States Attorney contact every jurisdiction in which Murr's conduct might possibly be under scrutiny.

The district court, however, rejected these arguments. It held that, on its face, Murr's plea agreement did not restrict the government from trying him in the Eastern District of Kentucky on the instant indictment. Its

finding is subject to the clearly erroneous standard of review. *See United States v. Robison*, 924 F.2d 612, 614 (6th Cir.1991).

In determining whether a plea agreement has been broken, "the trial court should lock to what the defendant reasonably understood" when he entered into the agreement. *United States v. Herrera*, 928 F.2d 769, 771 (6th Cir.1991). However,

> [i]t is impossible for a trial judge to properly administer a plea agreement if it consists of secret terms known only to the parties. Furthermore, "a plea bargain itself is contractual in nature and 'subject to contract-law standards.' " . . . [W]here Rule 11 procedures were fully adequate, absent extraordinary circumstances, or some explanation of why defendant did not reveal other terms, at least when specifically asked to do so by the court, a defendant's plea agreement consists of the terms revealed in open court[.]

Baker v. United States, 781 F.2d 85, 90 (6th Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986) (citations omitted). Hence, as the district court observed, the most persuasive evidence of what a defendant reasonably appreciated as his bargain is found in the plain language of the court-approved agreement.

Here, Murr participated in intensive negotiations with the government over a possible plea bargain. He was invited to advise the government of other districts in which

he required protection from prosecution so that they might be considered for inclusion in any agreement. In response, Murr raised concerns about his criminal liability in the Northern District of Florida, as well as in the Eastern District of Tennessee and the Northern District of Georgia. However, the ultimate product of the negotiations only contained an agreement not to prosecute him in the latter two venues. This promise was kept.[13] *See United States v. Turner*, 936 F.2d 221, 225 (6th Cir.1991) (United States Attorney's grant of "criminal immunity" within the Southern District of Florida did not bar prosecution in the Eastern District of Michigan).

Murr expressly acknowledged that the plea agreement he struck "constitute[d] the *full and complete agreement* and understanding between the parties concerning the defendant's guilt to the above-referenced charges, and that there are *no other agreements*, promises, undertakings or understandings between the defendant and the United States." (Emphasis added.) In doing so, we are satisfied that he comprehended the terms of the agreement. Thus, the district court did not err in finding that they had not been breached.

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[13]It may have been nothing more than good fortune for Murr that this was so. "[I]t is unclear that a United States Attorney in one judicial district has the power to bind another United States Attorney in another judicial district." *United States v. Turner*, 936 F.2d 221, 225-26 (6th Cir.1991).

Nonetheless, Murr insisted to the district court that he was lulled by the government into "letting sleeping dogs lie" with regard to other judicial districts where he might be criminally liable. Murr maintained that the government knew or should have known that charges against him were being prepared in the Eastern District of Kentucky. It then "sandbagged" him into not seeking a no-prosecution provision in his plea agreement pertaining to that venue.

The district court did not accept Murr's characterization of events. It concluded the the government, and specifically the Assistant United States Attorney who was negotiating with Murr, was unaware of his drug operation reaching into Kentucky until Jerry Parks was debriefed in late February of 1990. The record bears out such a conclusion, as does common sense. It is most unlikely that the government would have agreed to the deal that it did--five years' imprisonment--if it had been apprised of the full extent of Murr's alleged offenses. As the court opined, the burden was on Murr to obtain the best plea bargain that he could. Not surprisingly, he decided to keep silent about his cocaine venture in Kentucky, running the risk that it would eventually be exposed by the government. Unhappily for him, he lost this gamble and was indicted there. As we detect nothing akin to fraud surrounding the construction of the Tennessee plea agreement, the district court was correct in not going beyond its four corners to find that it did not bar Murr's prosecution in the instant case.

B. Sufficiency of the Evidence

Murr next contends that there was insufficient evidence underlying his conviction for having engaged in a continuing criminal enterprise.

Five elements comprise a continuing criminal enterprise offense:

> (1) a felony violation of the federal narcotics law: (2) as part of "a continuing series of violations;" (3) "in concert with five or more persons;" (4) for whom the defendant is an organizer or supervisor; and (5) from which he derives substantial income.

United States v. English, 925 F.2d 154, 156 (6th Cir.), *cert. denied*, __ U.S.__, 111 S.Ct. 2810, 115 Ed.2d 983 (1991) (quoting 21 U.S.C. § 848(c) (1988)). Viewing the evidence in the light most favorable to the government, we are persuaded a rational trier of fact could have determined that Murr's conduct satisfied these elements beyond a reasonable doubt.

The evidence revealed that Murr distributed thousands of dollars worth of illicit narcotics in an ongoing venture. His challenge to his conviction under 21 U.S.C. § 848 primarily rests on his assertion that he did not manage or organize "five or more persons," with whom he acted "in concert." We believe, however, that the government proved that Murr supervised at least six other individuals in such a context: Jerry Parks, Jim Hurt, Diane Whited, Tommy McKeehan, Robert Phibbs, and Ernie Nicely.

Jerry Parks was brought to Knoxville through Murr's machinations in order to sell cocaine to his pre-existing customers. Parks did so from August of 1988 until May of 1989. He obtained the drug in Kentucky at Murr's direction and, from January of 1989 until May of 1989, stored it in Knoxville. Murr paid him $500 for each kilogram of cocaine that he transported from Kentucky and $100 for each ounce of the drug that he delivered to Murr's customers.

Murr argues that Parks' employment with him could not have been used to support his continuing criminal enterprise conviction because the government was aware that Parks was selling drugs for him in the Eastern District of Tennessee when it entered into its plea agreement with him there. As we have explained, however, this agreement did not shield Murr from prosecution in the Eastern District of Kentucky. In addition, it did not prevent the government from using evidence which it possessed at the time to prove a criminal offense of which it did not then have actual knowledge. *See United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir.1986).

After Parks was arrested in May of 1989 on a burglary charge, Murr brought in Jim Hurt to take over some of Parks' functions. *See United States v. Chalkias*, 971 E.2d 1206, 1214 (6th Cir.1992) (approving customers is indication of coordination of another). Hurt sold cocaine to Edward Rogers but, as this cocaine was not of acceptable

quality, Rogers stopped buying front Hurt. Murr then began supplying Rogers himself.

Murr asserts that Hurt, who stepped into Parks' shoes, could not have been considered a distinct "person" for purposes of 21 U.S.C. § 848. However, as long as the defendant was an organizer or a supervisor of a "larger criminal organization," it is irrelevant that particular underlings came and went and were replaced. *United States v. Bafia*, 949 F.2d 1465, 1470-71 (7th Cir.1991). *See also United States v. Bond*, 847 F.2d 1233, 1237 (7th Cir.1988) ("A small time dope dealer who keeps to himself and has a single mule to smuggle the drug into the country is outside the statute's scope. The dealer's need to replace his aide.. . . would not authorize a CCE prosecution on the theory that the small-timer had one servant in January, a second in February, a third in March, and so on. The organization would never be larger than two."). Here, there was evidence that Murr coordinated a drug distribution enterprise of some dimension. As a result, Hurt could have been counted as a separate "person" who was managed by him.[14]

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[14]Murr asserts that, as the government's theory that Hurt was a supervisee of his was never advanced in front of the grand jury, there was a fatal variance between the indictment and the evidence introduced at trial. As a result, Murr argues that he was denied his Fifth Amendment right to be tried only upon those offenses which were first presented to a grand jury. The Supreme Court had concluded that an indictment is sufficient "if

it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.C.t. 2887, 2907, 41 L.Ed.2d 590 (1974). It is "generally sufficient if it sets forth the words of the statute itself, as long as the statute itself adequately states all of the elements of the offense." *United States v. Paulino*, 935 F.2d 739, 750 (6th Cir.), *cert. denied*, __U.S.__, 112 S.C,t. 883, 116 L.Ed.2d 787 (1992). Here, the indictment emanating from the grand jury racked the statutory language of 21 U.S.C. § 848, without naming any of the five persons purported to have been organize or managed by Murr. However, we have held in regard to a Conspiracy charge that "it is the grand jury's statement of the 'existence of the conspiracy agreement rather than the identity of those who agree' which places the defendant on notice of the charge he must be prepared to meet." *United Stated v. Piccolo*, 723 F.2d 1234, 1239 (6th Cir.1983) (en banc) (quoting *United States v. Davis*, 679 F.2d 845, 851 (11th Cir.1982)). Similarly, with a continuing criminal enterprise offense, there is no requirement that the indictment set out the identities of five alleged supervisees; the government need only demonstrate at trial that five or more persons were, in fact supervised. Murr also asserts that his Fifth Amendment rights were violated when the government did not pursue before the petit jury its theory, which it had put to the grand jury, that L.D. Welch and Conrad Schultz were part of his criminal enterprise. To Murr, this constituted an improper modification of the indictment. However, it is well-established that a "variance between the broad allegations in the indictment and the

The cocaine that was procured by Murr from September through November of 1988 was stored in the house he rented for defendant Diane Whited. *See Chalkias*, 971 F.2d at 1214 (storage of drugs in domicile of another implies existence of managerial relationships). Murr placed the drugs under Whited's dominion during that time and, on at least one occasion, she helped Murr and Parks weigh and package them. Parks made 15 to 20 trips to Whited's residence during the fall of 1988 to pick up cocaine which he then sold to Murr's customers. She, in turn, "watched" some of money that was generated from these transactions She Noms plainly a supervisee of Murr's.

While defendant Tommy McKeehan had his own customers to whom he sold drugs, he was also supervised in many respects by Murr. Each of McKeehan's excursions to Kentucky to buy cocaine, except for one, was arranged by Murr. During the initial trips, McKeehan travelled with Murr and was dependent upon him to get the drugs from defendant Kenneth Lawson and then to give McKeehan his share. Eventually, Murr assigned Parks to accompany McKeehan to Kentucky in his stead. Only the May 1989 trip was pint together by McKeehan, after Murr told him it would be all right to bypass Lawson and to contact

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narrower proof at trial" is acceptable so long as "the offense proved was fully contained within the indictment.'' *United States v. Miller*, 471 U. S. 130, 137, 105 S. C.t . 1811, 1816, 85 L.Ed.2d 99 (1985). Such was the situation here.

defendant Victor Rojas directly. "The ordinary meaning of the word 'organizer' does not carry with it the implication that the organizer is necessarily able to control those whom he or she organizes." *United States v. Ray*, 731 F.2d 1361, 1367 (9th Cir.1984). Although McKeehan had a significant degree of free agency vis-a-vis Murr, Murr facilitated his cocaine purchases; in turn, McKeehan lent support to Murr's efforts and submitted to his authority. Hence, Murr "organized" him in a manner coming within the ambit of 21 U.S.C. § 848.

On Murr's instructions, Robert Phibbs helped get Parks' probation transferred to Knoxville so that he might work for Murr in the drug distribution ring. When Parks sold cocaine to Murr's customers, he often gave the money he received in return to Phibbs for safekeeping. Phibbs was also part of the "security system" for concealing the cocaine stash after it was moved from Whited's residence. In case anything happened to Parks, he was the only other person who knew exactly where the drugs were located. After Murr was arrested in August of 1989, Phibbs collected money owed to Murr by defendant Edward Rogers from cocaine purchases made by Rogers. All of these activities suggested that Phibbs was an integral part of Murr's enterprise from September of 1988 through August of 1989.

In 1987, Ernie Nicely entered into a partnerships with Murr in several ventures. Until their assets were sold in June of 1989, Murr furnished Nicely, with some of the proceeds from his drug sales to keep these businesses afloat.

However, Murr required Nicely "to cover for half the moneys," i.e., to take credit for half of the investments, even though all of the money was actually coming from Murr. Nicely understood this money to be drug-related. After the assets of the businesses were liquidated, the proceeds were delivered by Nicely to Phibbs at Murr's direction. As a result, the jury could have concluded that Murr used Nicely to knowingly launder some of the profits from the drug distribution ring. While Nicely may have been unaware of most of the details of Murr's cocaine alteration, he clearly knew that Murr was trafficking in cocaine, and that his assistance was being sought in an attempt to squirrel away drug profits. He therefore agreed to the "design or plan" of Murr's venture. *United States v. Schuster*, 769 F.2d 337, 340 (6th Cir.1985) (citing *Jeffers v. United States*, 432 U.S. 137, 148-49, 97 S.Ct. 2207, 2214-15, 53 1,.F,d.2d 168 (1977)).

Accordingly, Murr supervised or otherwise coordinated at least five persons within the framework of a continuing criminal enterprise.[15] Nonetheless, Murr argues that, pursuant to 21 U.S.C. § 848, the government was obligated to prove he acted "in concert" with five other

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[15]The government has also asserted that Murr's ex-wife, Judy Murr, was controlled by him. In ruling upon Murr's motion for judgment of acquittal, the district court found that there was "no direct evidence that she was consciously a part of the drug conspiracy or did anything in furtherance of the conspiracy." After reviewing the record, we concur in the court's holding.

individuals simultaneously; evidence that five or more persons were involved in the enterprise at various times is not enough. He goes on to contend that the participation of the members of the drug distribution ring did not overlap such that he could have been shown to have managed the same five individual in a series of drug offenses.

Every circuit which has considered this argument has rejected it. *See Bafia*, 949 F.2d at 1470; *United States v. Jenkins*, 904 F 2d 549, 553-54 (10th Cir 1990); *United States v Ricks*, 882 F.2d 885, 891 (4th Cir. 1989), *cert. denied*, 493 U.S. 1047, 110 S.Ct. 846, 107 L.Ed.2d 841 (1990); *United States v. Fernandez*, 822 F.2d 282, 386 (3rd Cir.), *cert denied*, 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 391 (1987); *United States v. Boldin*, 818 F.2d 771, 775-76 (11th Cir.1987); *United States v. Lueth*, 807 F.2d 719, 731 (8th Cir.1986); *United States v. Burt*, 765 F.2d 1364, 1366 (9th Cir.1985); *United States v. Young*, 745 F.2d 733, 747 (2nd Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985); *United States v. Phillips*, 664 F.2d 971, 1034 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). "The question is whether [the defendant] acted in concert with five as *manager or coordinator*. It is on this question that the tenure of office of the staff is irrelevant." *Bond*, 847 F.2d at 1237 (emphasis added).

Hence, the government was only required to demonstrate that Murr had a conspiratorial agreement, as part of a design or plan, with each of at least five

underlings. The five need not have acted in concert with each other. *Bafia*, 949 F.2d at 1471 (citing *Jeffers v. United States*, 432 U.S. 137, 147-49 and n. 14, 97 S.Ct. 2207, 2214-15 and n. 14, 53 L.Ed.2d 168 (1977)). We are convinced that the government met its burden in this regard.

Murr further claims that the evidence underlying both his conviction for conspiracy and his distribution convictions was also insufficient. However, Parks' testimony was that he, Murr, and McKeehan made three trips to Kentucky in the fall of 1988 to obtain multi-kilogram quantities of cocaine from Lawson and Rojas. These drugs were then resold by them in Knoxville. In 1989, McKeehan and Parks journeyed to Kentucky on a monthly basis to procure cocaine. With one exception, Murr invested in the acquisition of these drugs, arranged the transactions, and directed the distribution of the drugs in Knoxville. McKeehan essentially gave the same account of Murr's actions at trial. Furthermore, Edward Rogers testified that he was introduced to Parks by Murr, who asked him whether he would be willing to purchase cocaine from Parks. After Parks was arrested, Murr replaced him with Jim Hurt, and when Rogers became dissatisfied with the cocaine sold to him by Hurt, Murr personally supplied Rogers. This testimony, and that of other witnesses, was corroborated by the government's introduction of hotel and telephone records, as well as books taken from Parks, which detailed some of the activities of the drug distribution ring. Such evidence could have led a rational jury to find Murr

guilty of those charges on which he was convicted.[16]

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[16]Murr especially takes issue with his convictions on count two (possession of cocaine with intent to distribute, or aiding and abetting the same, or about August 25, 1988) and count nine (possession of cocaine with intent to distribute, or aiding and abetting the same, on or about May 8 or 9, 1989) of the indictment. With regard to count two, there was evidence that Murr planned to obtain four kilograms of cocaine from Lawson near Lexington, Kentucky, on the date charged. However, the transaction did not come off because Parks, who was carrying the money, was delayed in reaching the Kentucky rendezvous site. The deal was ultimately consummated after other arrangements were made. It was reasonable to infer that when Murr met with Lawson on August 25, one or both of them possessed the cocaine, though the exchange did not actually take place on that date. Even if the cocaine was exclusively in Lawson's possession, liability could be imputed to Murr as a co-conspirator under *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). As for count nine, the evidence showed that Parks and McKeehan travelled to Kentucky to acquire one kilogram of cocaine, which was brought by McKeehan with his oven money. However, Murr set up the purchase and sent Parks, his subordinate, to accompany McKeehan on the trip. Furthermore, after Parks and McKeehan returned to Knoxville, Tennessee, about half of the kilogram of cocaine was conveyed to Parks on Murr's behalf because their supply of the drug had run out. This was supported by Parks' seized drug records, which showed that he had "borrowed" approximately 16 ounces of cocaine from McKeehan in May of 1989. Thus, there was sufficient evidence to sustain Murr's conviction on count nine.

C. Bill of Particulars; Jury Instructions

Murr further Contends that the district court erred in denying his motion for a bill of particulars naming the five individuals whom he purportedly supervised in a continuing criminal enterprise. He asserts that, in the absence of such information, he was deprived of his ability to prepare a proper defense.

"The grant or denial of a motion for a bill of particulars lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion" *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991). "Proof of abuse of discretion 'requires a showing of actual surprise at trial and prejudice to the defendant's substantial rights by the denial.'" *Id.* (quoting *United States v. Paiva*, 892 F.2d 148, 154 (1st Cir. 1989)).

Absent such a showing, "there is no requirement that an indictment or a bill of particulars identify the supervisees in a [case pursuant to 21 U.S.C. § 848]." *English*, 925 F.2d at 159 (quoting *United States v. Zanzucchi*, 892 F.2d 56, 58 (9th Cir.1989)). The statute "does not make the identity of the [persons managed] important"; the government only has to prove that five or more individuals were, in fact, managed by the defendant. *United States v. Beverly*, 913 F.2d 337, 352-53 (7th Cir.1990).

Our task, therefore, is to determine whether Murr was legitimately surprised at the list of alleged supervisees first referred to by the government following the close of its proof. We think that he was not. Tommy McKeehan, Diane

Whited, and Robert Phibbs, were co-defendants and were further referred to in pretrial discovery. Jerry Parks and Ernie Nicely, were known by Murr to be government witnesses, and were cross-examined by him at a hearing one month prior to trial. Jim Hurt's name was included in the government's supplemental bill of particulars, filed on September 11, 1991. Murr's ex-wife, Judy, lived with him at times during the life of the conspiracy, and was adverted to in Special Agent Merryman's grand jury testimony, which was provided to Murr as Jencks Act material. *See* 18 U.S.C. § 3500. As a result, Murr should have been put on notice that any or all of these individuals might be persons whom the government would allege were controlled by him.

Murr also claims that the district court erred in refusing to instruct the jury as requested by the defense as to which persons could not he considered one of the five predicate supervisees for a conviction under 21 U.S.C. § 848.

When it became apparent that Murr's suggested list was unduly long the court raised the possibility of furnishing the jury with the names of the seven individuals whom the government actually contended were managed by him. Murr's counsel however objected to Judy Murr's name being included in this fashion because "we never had the opportunity to even deal with her." The court feeling it was being "whipsawed" then offered defendants a choice: it would either tell the jury to only consider the seven persons specified by the government or it would give no other instructions on the matter. When Murr's counsel

continued to protest the court decided not to provide a narrowing instruction.

We have not adopted a pattern instruction for the offense of conducting a continuing criminal enterprise. *Chalkias*, 971 F.2d at 1215 n. 10. The district court stepped into this void by informing the jury, in part that

> [t]he terms organizer supervisor or manager are to be given their usual and ordinary meanings as commonly understood by the public or business community. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activity in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others. In other words the Government must prove beyond a reasonable doubt that the Defendant Murr was more than just a fellow worker but likewise Defendant Murr need not be the dominant organizer or manager as long as he was in a managerial position with respect to five other persons.

In *United States v. Chalkias*, we held that a less-detailed instruction than this one was not "so deficient as to constitute plain error." *Id.* at 1215. There, we were invited to adhere to a ruling by the Ninth Circuit that

> where the jury had a confusing, array of persons presented, some of who could be counted [as managed by a CCE defendant] and some of whom

> could not be counted it was plain error to fail to instruct jury as to who could not count towards [the defendant's] conviction of a continuing criminal enterprise.

Id. at]214 (quoting *United States v. Jerome*, 924 F.2d 170 173 (9th Cir.) *opinion replaced,* 912 F.2d 1328 (9th Cir.1991)).

Jerome involved a situation where the government had argued to the jury that the defendant could be viewed as the organizer of his "suppliers" and "the suppliers of his suppliers." 924 F.2d at 172. The Ninth Circuit was of the opinion that this was incorrect as a matter of law holding that "an organizer within the sense of the statute [is more than] simply being a steady customer." *Id.* at 173. Accordingly the district court's lack of an instruction in this regard was troublesome.

The circumstances were different in *Chalkias;* government did not put before the jury "an erroneous list of persons managed by [the defendant]." 971 F.2d at 1215. Consequently we determined that the holding in *Jerome*. was not applicable. We also declined to take the position that "failure to give an instruction setting out the persons that could not be considered to have been managed by a CCE defendant is *per se* plain error." *Id.*

In the case at bar as in Chalkias, the government did not mislead the jury concerning who, as a matter of law,

could be deemed to be a supervisee of Murr's.[17] This leads us to reach the same conclusion as we did there--that the jury was not subjected to undue confusion "in the context of the case of a whole." *Id.*

Murr further suggests that the district court should have instructed the jury that, in order to convict him of directing a continuing criminal enterprise, it had to unanimously determine the identities of the five individuals he supervised or organized. As the jury was under no duty to make such a finding, Murr's argument lacks merit. *Id.* at 1214 n. 7. *See also English,* 925 F.2d at 157-58.

Additionally, Murr asserts that the district court should have instructed the jury that a mere buyer-seller relationship does not establish one that is supervisory in nature. *See Chalkias,* 971 F.2d at 1214. However, the evidence adduced at trial indicated that none of the individuals the government contended he managed was in a buyer-seller relationship with him. Therefore, he was not entitled to the requested instruction. *See United States v.*

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[17]In passing upon Murr's motion for judgment of acquittal the district court found there was insufficient evidence that Judy Murr was managed by Murr. The jury, however, was not categorically misinformed about her conduct as was the jury in *Jerome.* In that case, the Ninth Circuit held that persons who have the *status* of suppliers cannot be said to have been "organized" by their customers. Nothing that Judy Murr supposedly did to advance the charge conspiracy put her in a similar position.

Canino, 949 F.2d 928, 941 (7th Cir.1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1701, 118 L.Ed.2d 410 (1992).

D. The Government's Disclosure of *Brady* and Jencks Act Materials

Lastly, Murr asserts that the government did not turn over relevant exculpatory and impeachment evidence to defendants in a timely manner, thereby denying them a fair trial.

Pursuant to the Jencks Act, 18 U.S.C. § 3500(b), "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

Furthermore, as a general matter, the government is required "upon request, to give a defendant any exculpatory information the prosecut[ion] may have which is material to guilt or innocence." *United States v. Bibby*, 752 F.2d 1116, 1125 (6th Cir.1985) (citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (9163)). Similarly, the accused must be afforded any relevant impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Unlike the Jencks Act, the force of *Brady* and its progeny is not limited to the statements and reports of witnesses.

Murr calls our attention to the following *Brady* and Jencks Act materials which the defense either did not receive or, in his opinion, did not receive in time to have used effectively at trial; documents reporting suspected wrongdoing by Tommy McKeehan; notes from government-conducted interviews of McKeehan; probation officer Ed Lynn's file on Jerry Parks; forms outlining government payments to Parks and Ernie Nicely; information about Parks' association with an individual named Sam Scruggs in a cocaine distribution scheme; checks made out to Parks by Murr and drawn on Automotive Enterprises; the original of a letter by Robert Phibbs to the United States Probation Office offering Parks a job with Automotive Enterprises; Parks; tape recordings recounting his participation in a variety of drug transactions; Jencks Act material derived from Edward Rogers; and Parks' prison records. Murr contends that, had defendants been able to take advantage of these materials, they might have influenced the jury's assessment of their culpability.

The record reveals that defendants were, in fact, able to make use of Parks' tapes at trial, playing portions of them to the Jury. Likewise, the defense employed Lynn's file on Parks to conduct a searching cross-examination of the officer.

As for Parks' prison records, the government maintains that they were never in the prosecution's control and that it was otherwise unaware of any exculpatory information contained within them. *See Bibby,* 752 F.2d at

1125 (due process requires only that government, upon request, divulge to defendant relevant exculpatory evidence possessed by the prosecution); *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400 49 L.Ed.2d 342 (1976) (*Brady* doctrine only covers evidence which prosecution knew or should have known was exculpatory). The government did eventually provide the records to defense counsel just before Parks was cross-examined, and they were exploited accordingly.

The government furnished the defense with records concerning payments made to Parks and Nicely stemming from their respective service as informants. Other memoranda were given to the district court under seal because they included information regarding their whereabouts following their relocation by the government. The court reviewed these documents in camera and determined they had not impeachment value beyond those materials which defendants already had obtained. Our own examination of the memoranda confirms this. Their suppression did not act to "undermine confidence in the outcome" of the instant case. *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381.

With regard to the Phibbs letter and the checks made out to Parks by Murr, government counsel stated to the district court that these materials only "came to [his] attention" after the discovery deadline had passed. He then promised to turn them over to defendants. When the government could not find the original Phibbs letter, it

sought to introduce a copy into evidence; the district court sustained a defense objection to the copy being admitted. While there are conflicting accounts of whether the checks were, in fact, furnished to the defense, Murr was able to introduce into evidence an Automotive Enterprises check written out to Parks by Phibbs, and had the opportunity to cross-examine Parks about the check. Assuming, *arguendo,* that defendants did not receive the checks, the totality of the evidence presented convinces us there was not a reasonable probability that, had they been disclosed, the results of the trial would have been different. *See Pennsylvania v. Ritchie,* 480 U.S. 39, 57, 107, S.Ct. 989, 1001, 94 L.Ed.3d 40 (1987).

Government counsel and Special Agent Merryman interviewed McKeehan before trial regarding his drug dealing. McKeehan did not, however, adopt the notes that were taken at these interviews as "substantially verbatim to the statement[s] given [by him]." *United States v. Williams,* 962 F.2d 1218, 1224 (6th Cir.), *cert. denied, Williams v. United States,* __U.S.__, 113 S.Ct. 264, 121, L.Ed.2d 194 (1992) (quoting *United States v. Arnold,* 890 F.2d 825, 829 (6th Cir. 1989)). As a result, they did not constitute Jencks Act material.

The defense also requested information concerning McKeehan's plea agreement with the government, and any investigations of criminal wrongdoing on this part touch upon by the agreement. In response, the defendants were provided with copies of the agreement, which names 16

judicial districts where the government had afforded McKeehan protection from prosecution. In addition, they were given copies of both McKeehan's "rap sheet" and an affidavit from his treating psychiatrist.

The government went on to describe to defendants two incidents of cocaine transportation which explained the inclusion of most of the 16 districts in McKeehan's plea agreement. Defendants, however, asked for additional information which would account for the remaining districts; in particular, they sought the results of a Tennessee grand jury investigation into McKeehan's activities. Government counsel asserted that it was not required to divulge evidence concerning "suspected" wrong dongs on ongoing criminal investigations. He then represented to the district court that the government had disclosed all "tangible" records of established wrongdoing, i.e., McKeehan's criminal history and misconduct acknowledged by him as part of his plea bargain.

Evidence in the prosecution's files related to the "suspected" wrongdoing of a witness must be made known to the defendant if it is favorable to the accused and is material to the question of his guilt or innocence. *See Bagley,* 473 U.S. at 676, 105 S.Ct. at 3380. The Supreme Court, in construing the government's obligations under *Brady v. Maryland* and its offspring, has drawn no distinction between such evidence and that pertaining to proven or admitted criminal behavior.

Frequently, though, evidence associated with "suspected" wrong doing will not be admissible even for impeachment purposes, having no bearing on the capacity for truth of any witness. Furthermore, even if logically relevant, its prejudicial effect may nonetheless substantially outweigh its probative value, thus pointing towards its exclusion. *See* Fed.R.Evid. 403. Additionally, its probative value may be eclipsed by the likely harm resulting from its public revelation, such as to persons embroiled in the case, or to others, or to the success or direction of a continuing official investigation. However, in the unusual instance that its suppression acted to deny a defendant a fair trial, reversal is mandated. *See Bagley,* 473 U.S. at 678, 105 S.Ct. at 3381.

Here, we are satisfied that defendants were accorded the lion's share of any evidence the government had that properly could have been used to impeach McKeehan. The defense incisively cross-examined him on the basis of this evidence. We do not feel the outcome of the proceedings would have been altered if defendants had been privy to the information which was withheld from them.

In the case of Rogers, defendants were furnished with copies of his plea agreement, which memorialized his guilty plea to the conspiracy charged in the case at bar, as well as to a RICO charge flowing from a pending investigation in the Eastern District of Tennessee. They were also given copies of Rogers' "rap sheet," information

regarding sundry other "bad acts" committed by him, and copies of five reports of government interviews with him.

The government did not, however, provide the defense with transcripts of FBI interviews with Rogers concerning his awareness of facts pertinent to the Tennessee RICO investigation. These documents were filed under seal with the district court, which found that they did not contain exculpatory information. We concur with the court's decision not to compel the release of this material.

The information concerning Parks' transportation of cocaine for Sam Scruggs in the summer of 1988, just prior to the time he joined the charged conspiracy, was also kept under seal by the district court. Much of it probably would not have been admissible as probative of Parks' character for truthfulness. *See* Fed.R.Evid. 608(b). At most, if disclosed to the defense, it would have constituted cumulative impeachment evidence. Accordingly, its suppression does not require that defendants' convictions be vitiated. Having thus concluded that the districts court's handling of defendants' *Brady* and Jencks Act concerns was appropriate, Murr's contentions must be rejected.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

ORDER

Civil No. 90-26-S
filed February 20, 1996

Pages B-1 thru B-3

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed: February 20, 1996]

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 90-26-S
	)	
ROBERT DALE MURR	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on the Defendant Robert Dale Murr's motion for a new trial [Record No. 738].

The Defendant moves the court for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure by reason of newly discovered evidence of the government's failure to provide the Defendant with material exculpatory evidence.

Motions for a new trial on the presentation of newly discovered evidence are disfavored and a trial court's deter-

mination that a new trial is not warranted will not be reversed unless there is a clear abuse of discretion. *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986). Before a new trial can be granted pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the Defendant must establish the following elements as set forth in *United States* v. *Barlow*, 693 F.2d 954, 966 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983):

(1) the new trial evidence was discovered after the trial;

(2) the evidence could not have been discovered earlier with due diligence;

(3) the evidence is material and not merely cumulative or impeaching; and

(4) the evidence would likely produce an acquittal.

Upon the examination of all the information presented, including the Defendant's reply to the Government's response [Record No. 748], the Government's surreply [Record No. 749], and the Defendant's submission of additional legal authority [Record No. 751], the Court finds that the Defendant has failed to satisfy all the elements of the *Barlow* four-pronged test. Moreover, the Court finds that the trial court, as well as the Sixth Circuit Court of Appeals, addressed this evidence issue and ruled that the evidence could not be considered "newly discovered". Furthermore,

courts addressing this particular issue have asserted that the prosecution is under no duty to produce evidence that is available to the defendant. *O'Dell*, 805 F.2d at 641, citing *United States v. Jones*, 712 F.2d 115, 122 (5th Cir. 1983). Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) that the Defendant Robert Dale Murr's motion for a new trial [Record No. 738] is **OVERRULED**,

(2) that the Defendant's request for an oral argument construed as a motion for a hearing [Record No. 748] is **OVERRULED**,

(3) that this is a final and appealable Order.

This 20 day of February, 1996.

HENRY R. WILHOIT, JR. JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case №. 96-5241
Decided January 28, 1997

Pages C-1 thru C-4

APPENDIX C

No. 96-5241

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Opinion Delivered: January 28, 1997]

UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	OPINION
	)	
	)	
ROBERT DALE MURR	)	
	)	
	)	
Defendant - Appellant.	)	

BEFORE: GUY, SUHRHEINRICH AND BATCHELDER, Circuit Judges

JUDGE BATCHELDER for the Court:

The first thing I want to say, here, counsel is that we recognize the importance of noting that the conduct of the FBI Agent in question here is something to be roundly condemned, and we do that. But it is also to be distinguished from the issues before us on this appeal.

The substance of the motion before us is that two pieces of evidence were new and warrant a new trial. The first is

the full extent of Agent Merryman's relationship with Brewer, who was a female cooperating witness in an investigation of an individual -- not this defendant, and the consequences to Merryman of that relationship. Secondly, the full extent of Agent Merryman's relationship with Jerry Parks, a male witness in this case.

In *United States* v. *Barlow* we said that there were four criteria that we have to look at in order to determine whether new evidence was of a character to warrant a new trial. First, that the evidence must have been discovered after the trial; second, it must have been discovered -- that it must have been undiscoverable prior to trial if the defendant or counsel had used due diligence; third, that it must be material to the issue of guilt and not merely cumulative or impeaching; and fourth, that it would likely have produced an acquittal.

We noted in the *O'Dell* case that that fourth criterion (the likelihood of producing an acquittal) is not applied if the evidence in question was actually suppressed by the prosecution. For example, where the new evidence is that the perjured testimony was knowingly used by the prosecution, the test is less stringent. In that case the test is if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

In this case, in its prior incarnation before this Court in

United States v. *Phibbs* we said that evidence in the prosecution's files related to the suspected wrongdoing of a witness must be made known to the defendant if it is favorable to the accused and is material to the question of his guilt or innocence. Here, after we carefully have reviewed all of the evidence which the defendant has cited relative to Agent Merryman's relationship with the female, cooperating witness, Brewer, we are of the opinion that it is certainly clear that when Merryman was questioned by the Trial Court during the trial of this case, he attempted to minimize that relationship. But he didn't deny the relationship, and it is also clear that the only thing that is really "new," by way of evidence in regard to this relationship, is that he was later issued a suspension as a result of his having engaged in the illicit relationship with that cooperating witness.

The evidence of the suspension was not discovered, though, during trial because no suspension had been issued. More importantly, it is not evidence which is material to the defendant's guilt. It is impeaching evidence only. We think that it would go to the issue of credibility of Agent Merryman, but there isn't any evidence that the government knowingly used perjured testimony in this case. So whether we are talking about *Barlow* or *O'Dell* or *Bagley*, we are of the opinion that the evidence, had it been known to the defendant in its full glory, was at best impeaching and cumulative and would not likely have produced an acquittal;

and since there is no evidence of deliberate use of perjured testimony by the government, we think that the most stringent test is not probable [applicable?] here.

In regard to agent Parks, we have also reviewed all of that evidence. Again, a good deal of that was in fact before the jury because there was considerable cross examination of agent Parks. But this again was simply not evidence which was material to the guilt of this defendant. Furthermore, it appears to us from this record that this doesn't even meet the test of being undiscoverable prior to trial, had due diligence been used. All of the players were clearly known, and there is no question that that could have been pursued. For those reasons, we will affirm the judgment of the District Court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case Nº. 96-5241
Filed January 31, 1997

Pages D-1 thru D-4

APPENDIX D

No. 96-5241

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: January 31, 1997]

UNITED STATES OF AMERICA	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	ORDER
	)	
	)	
ROBERT DALE MURR	)	
	)	
Defendant - Appellant.	)	

BEFORE: GUY, SUHRHEINRICH AND BATCHELDER, Circuit Judges

This cause having come on to be heard upon the record, the briefs, and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT.
Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case №. 96-5241
Filed March 27, 1997

Pages E-1 thru E-2

APPENDIX E

No. 96-5241

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: March 27, 1997]

UNITED STATES OF AMERICA	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	ORDER
	)	
	)	
ROBERT DALE MURR	)	
	)	
Defendant - Appellant.	)	

BEFORE: GUY, SUHRHEINRICH AND BATCHELDER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

Leonard Green, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

TRANSCRIPT EXCERPTS OF
TRIAL PROCEEDINGS
(SEALED BENCH CONFERENCE)

Civil No. 90-26-S
held September 25, 1991

Pages F-1 thru F-14

APPENDIX F

[Relevant Excerpts of Proceedings]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

UNITED STATES OF AMERICA	) Lexington Criminal
	) No. 90-26-S
	) September 25, 1991
	) 2:50 p.m.
vs.	)
	) VOLUME IX-A
	) (SEALED)
VICTOR MANUEL ROJAS,	)
WILLIAM BAIRD,	)
RAYMOND EUGENE HUCKELBY	)
KENNETH RAY LAWSON,	)
MARY LAWSON,	)
ROBERT DALE MURR,	)
WILLIAM ROBERT PHIBBS,	)
DIANE WHITED,	)
	)
Defendants.	)

TRANSCRIPT OF TRIAL PROCEEDINGS

(SEALED BENCH CONFERENCE)

BEFORE THE HONORABLE HENRY R. WILHOIT, JR.

UNITED STATES DISTRICT JUDGE AND A JURY

APPEARANCES:

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Court Reporter:
Peggy Westman, RPR
Official Court Reporter
P.O. Box 362
Lexington, Kentucky 40585-0362

(Whereupon, a sealed bench conference was had with the Court, Assistant United States Attorneys, and defense counsel representing Defendant Murr.)

MR. MONCIER: Have you seen the letter?

THE COURT: Yes. Let me see it. I am sure this is --

MR. WINCK: It is the original.

THE COURT: Okay. This is in regard to your letter to Mr. Winck of September the 24th?

MR. MONCIER: That's correct. Your Honor, it had been my hope that Mr. Winck would have given me some guidance on this matter before the Court was involved. I have heard nothing back from him. And I first asked him this morning whether he intended to respond, and he told me that he was going to give a copy of the letter to the Court.

I have got very conflicting matters, particularly with a fellow member of the bar, Ms. Catron, in the duties that I have to defend my client on these serious charges, and something or exploring something that may go to the bias and prejudice of the witness, the pressures that my be on the witness.

As I said, I had hoped this would be confirmed or denied to me before involving the Court.

The matter concerning Agent Finkin is a concern to us. We have also, and I will tell --

THE COURT: Agent Finkin? I thought it was Agent Merryman.

MR. MONCIER: No, it is Agent Finkin, Your Honor, that we feel was been under severe pressures in this case because he is the agent under the direct supervision of Agent Malone.

THE COURT: Okay.

MR. MONCIER: And that causes us a concern if Agent Malone and Ms. Catron have a close personal relationship. Obviously, the pressures of this case have been immense on all of us. But if that is the case, that may very well have a bearing on his testimony. Whether or not -- I need first to know. I just don't want to approach something like that out in the courtroom.

THE COURT: What was it I told the attorneys here earlier in the week in the trial, that a dog once scalded will run even from cold water.

Okay. I have read the letter.

MR. MONCIER: Let me say with Agent Merryman, of course, it becomes more intense because if that information is true concerning Agent Merryman, we believe that there is a whole -- there is probably an FBI investigation.

We have very reliable information that Agent Merryman has been involved in a relationship with Mr. Gibson's ex-wife, that Federal money was used during that relationship for her and her child.

THE COURT: Let me ask you this: Let's take up the agent first.

MR. MONCIER: Which one? Finkin?

THE COURT: Merryman.

MR. MONCIER: Okay.

THE COURT: If he had had -- if he had had a suspension -- is this supposed to have been recent? Is he suspended?

MR. MONCIER: My information is that he --

MR. WINCK: No, sir.

THE COURT: Well, that moots that out.

MR. MONCIER: Well, is there one coming? Is my information accurate? If he would give me a written statement that there is no truth to either of these allegations, I would have never brought it up.

THE COURT: All right. Now, what about Agent Merryman? Has he in the past had any relationship with the wife of a convicted drug dealer?

MR. WINCK: I asked him in response to this particular letter, first of all, was he suspended. He said, no.

Secondly, did he have a personal relationship outside of business activities with a former wife of the convicted drug dealer, Johnny Gibson. He advised me that he did not.

Now, has he participated in the investigation of Mr. Gibson and her. She was convicted.

THE COURT: Is she in jail?

MR. WINCK: She is out now. But she was also a witness, so he had professional dealings with her.

THE COURT: Not personal dealings?

MR. WINCK: That's right.

THE COURT: Okay.

MR. WINCK: That would be our response to both inquiries in that request.

MR. MONCIER: Has his relationship with her been the subject of any investigation by the FBI?

THE COURT: Now, he would know if there has been an internal investigation, because he would have been the first one they come to to ask some questions. Has he been questioned?

MR. WINCK: He has been questioned.

MR. MONCIER: Is there an investigation pertaining to his activities with Ms. Gibson?

MR. WINCK: My understanding is that is over with. The inquiries have stopped, and it has been some time ago and he was never suspended.

MR. MONCIER: Has he got a suspension in the future?

MR. WINCK: Not that I am aware of, not that he is aware of know [sic].

THE COURT: You are representing to me that matter is closed?

MR. WINCK: I got this last night at 11:00 p.m. And I went to Agent Merryman, who is my only source, and he advised me that it was inquired into and he has never been suspended and never told he was going to be suspended.

MR. MONCIER: Has he --

THE COURT: Why --

MR. WINCK: I don't know anything more than that.

THE COURT: As I take it from you or if I take it from Agent Merryman, his superiors were acting upon some rumor, just as Mr. Moncier is acting here at this hour, and he was asked about it.

MR. WINCK: I presume so. I don't know anymore than I told the Court and what he's told me.

THE COURT: Well, get him up here. Put him under oath.

* * *

Mr. WINCK: (In open court.) Agent Merryman, come up here.

THE COURT: (Back to bench conference.) Agent Merryman, raise your right hand.

AGENT MERRYMAN

having been first duly placed under oath by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT: All right. Let me have that letter. Are you aware of this letter from Mr. Moncier to Mr. Winck?

A. Mr. Winck showed it to me last night about 11:30. He had just gotten it.

Q. Have you had any kind of personal relationship with the wife of Johnny Gibson, who is a convicted drug dealer?

A. The lady in question her name is Karen Anita Brewer. She is a girlfriend or ex-girlfriend of Mr. Gibson. She was a witness, came to us in 1988, in the summer of

1988, stating that she wanted to get away from Mr. Gibson and the torment and so forth that she was involved in. The FBI gave her housing or relocation at that particular time in the Knoxville area. She declined. Mr. Gibson beat her up. She got an injunction against him. Mr. Gibson then shot at her. And there are witness' reports about all of this. Several months later she was then relocated with her daughter and her sister into the Knoxville area potentially as a witness but was never actually used as one in the investigation. I dealt --

Q. Well, that is all very interesting. My question was did you have -- have you had at any time a personal or a romantic relationship with that woman?

A. I have not had a romantic relationship with that woman. The woman has made a serious allegation, which I would just advise the Court, the FBI --

Q. Suggesting romantic involvement?

A. Suggesting a lot of different things.

Q. Including romantic?

A. Including that. She made a lot of allegations, which came to my attention really before they were made, and she has been interviewed. I don't know the specifics of the allegations. My boss has advised me at the FBI of the general nature of those allegations. Of the many allegations -

of the many allegations that she has made concerning me, all of those allegations are false, and I have been interviewed at FBI headquarters about this and have agreed to take a polygraph, except one part of one allegation, and I have been interviewed about that. It is a matter that is being handled at FBI headquarters at this time. I have told the truth concerning that. And I had some extremely limited contact with this girl for an extremely brief period of time that I should not have had, and I so stated in the interview. She started making approaches on me almost from the first time that I met her, which a lot of people, including her family, are aware of. She was treated extremely nice by myself and by everyone else. And in the early part of this year we received information from her family that Mr. Gibson was starting to send her money again, who is in prison. It was after that happened that she made a bunch of allegations against me, that included that, but were not limited to that. Everything that this girl has said is false, except one part of one allegation, and I did overstep my bounds as a person in my dealings with her. It was extremely limited, and I stopped it. I shut it down, and I told her that at the time. And we continued to have a very good professional relationship for months and months after that. And --

Q. All right. Well, have you --

A. The relationship was --

Q. Have you been suspended for this investigation?

A. I have not received any type of reprimand of any kind over this incident. There was a rumor that has come to my attention in Knoxville. I went to FBI headquarters for two weeks in June, which was strictly part of my job, and I worked over there. As a matter of fact, it was a part of a promotional opportunity for me to see if I wanted to go to headquarters and get a promotion.

Q. You talking about in Washington?

A. Yes. And after that rumors came back to me that I was going to be transferred to Chicago. It all came out of one --

Q. Wait a second.

A. I'm sorry.

Q. You say you have not been suspended, you have not been reprimanded?

A. No, sir.

Q. Did the FBI in Knoxville open a file on these rumors to conduct an investigation as to whether or not it was true that you had a romantic relationship with Gibson's girlfriend?

A. I honestly don't know that. I can tell you what our policy normally is. Nobody's told me that we have a file or that we have -- I was told to go up to Washington one particular day to be interviewed about this, and I did travel up there to submit to an interview. And I told exactly the truth about every matter. And I offered to take a polygraph regarding everything and still have that offer.

Q. Okay. Is there still an ongoing investigation as to these allegations made by the girlfriend of Johnny Gibson?

A. I honestly don't know that. One of the problems we have as agents in these matters is we don't -- we are not really told when these matters have been resolved. And this is a big gripe among the agents today about these type of things.

Q. But you have not been suspended?

A. I have not been orally reprimanded.

Q. Or suspended?

A. I have not received a letter of suspension.

THE COURT: Okay. You may resume your seat.

* * *

(Whereupon, Agent Merryman approached the bench for further questioning.)

THE COURT: Okay. In what way do you believe that in one instance or a limited instance did you overstep your bounds?

AGENT MERRYMAN: Physically.

THE COURT: Like what?

AGENT MERRYMAN: We were moderately intimate.

THE COURT: On one occasion or more than one occasion?

AGENT MERRYMAN: As I told up at headquarters, to the very best of my memory, it occurred three occasions, each time instigated totally by her, each time terminated by me. * * *

* * *

THE COURT: On these three occasions --

AGENT MERRYMAN: Yes, sir.

THE COURT: -- are you saying to me that you did have sexual intercourse with her?

AGENT MERRYMAN: We could split hairs on that, but my conduct was certainly unbecoming, my position. And I will say to you I did not -- I got into the early stages of that. I never completed that. That's as candid as I can be. That's the truth.

THE COURT: All right you may have a seat back there.

AGENT MERRYMAN: And I would stress to you that I terminated that relationship very quickly.

* * *

THE COURT: All right. The ruling of the Court is that right now I don't see sufficient connection between the allegations of Agent Merryman and this woman in Tennessee, Ms. Brewer, to where it would be relevant, competent material to permit cross-examination by Mr. Moncier.

While it is true that Mr. Merryman has compromised himself, still I am thinking that, if his conduct was so objectionable, that his superiors would have suspended him. And had he been suspended or reprimanded in some way, and, you know, you might have something to talk about.

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT KNOXVILLE

TRANSCRIPT EXCERPTS OF
TRIAL PROCEEDINGS
(OPEN COURT HEARINGS)

Civil No. CV 3-91-465
held February 25, 1994

Pages G-1 thru G-9

APPENDIX G

[Relevant Excerpts of Proceedings]

VOLUME IV OF IV VOLUMES

THIS TRANSCRIPT CONSISTS OF IN-CAMERA AND

OPEN-COURT HEARINGS.

SEE INDEX AND TOP OF EACH PAGE.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOHNNY NELSON GIBSON,	) Docket No.
	) CV 3-91-465
Petitioner,	)
	)
-versus-	)
	) Knoxville,
	) Tennessee
UNITED STATES OF AMERICA,	) February 25, 1994
	)
Respondent.	)

BEFORE: THE HONORABLE THOMAS W. PHILLIPS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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RESPONDENT'S WITNESS, CLYDE MERRYMAN,
PREVIOUSLY SWORN
DIRECT EXAMINATION

* * *

Q. Some time during 1989 did you have sex with Karen Brewer?

A. I did.

Q. Approximately when did this first happen and for how long did it last?

A. It happened one evening and I have absolutely, of course, tried for quite a long time, for different reasons, to recreate everything about this relationship. The first time it occurred was late one evening, of course at the Warren House, and Karen had, I had been working down in Monroe County, it was late. As Karen was apt to do, she called my office and wanted me to, wanted the office to beep me and get a message that she needed to see me urgently, that was not unusual for Karen, and I went by there and we talked and her comment to me was that she missed me, and we talked some more and she talked about how she was very isolated and under a lot of pressure and so forth and so on, and basically expressed an interest in having a sexual, and she didn't put it that way, and I don't want that to sound in any way demeaning to Karen. She wanted to have a relationship with me, and so we engaged in sex very briefly that evening. I, of course, went home and then that type of contact with Karen continued, to the very best of my recollection, into the fall of that same year, 1989. It was terminated by me.

Q. Why?

A. I told Karen it was wrong, I actually used the word wrong, Karen and I still maintained; in addition to that relationship, Karen and I still maintained the same type of relationship I would have with any witness. When something came up that pertained to this case I would inter-

view her, I would talk with her, Bill Vanderland would go talk with her, and so forth. After the first physical contact that I had with Karen that evening, I was very disappointed in myself, and I continued to have some contacts with Karen, and I don't want to diminish that in any way to the court or to anybody in this room. It is very difficult to explain why all of that occurred, but, in any case, it did occur, I basically just took the position it was wrong and in my mind, in my heart, and to Karen, and Karen wanted to continue the relationship. I remember one conversation vividly, there was a little balcony outside of the Warren House and this was still in warm enough weather where we were standing outside on the balcony talking, you had to go up to the balcony, knock on the door, and you went outside and we were standing out there, just the two of us talking and it was talking about that part of our relationship and she made the comment to me, which I think she meant, that it was a sincere comment, that she would never do anything to hurt me or hurt my career or hurt my job, and then I said some things to her back about that. I told her that I wasn't worried about that; of course I was worried about that, I would have been crazy not to have been worried about that, but I didn't say that to her in my words, and we talked about it, we talked about the fact that we had, I mean, this relationship, which I am sure Karen knew I was out of line in engaging in. Regardless of Karen's educational level or my educational level, we both knew that this wasn't a proper

relationship, and it terminated and it didn't terminate with any animosity or any hard feelings, and it certainly never changed the other side of our relationship, which was that she was always level to give information and to do whatever. This was just, this was just a side to the less of it, and then I would add to the court and to everyone in East Tennessee that I am extremely ashamed of myself, I am embarrassed for that, and I made up my mind long ago that if this ever came up I would be truthful about it and lack of candor would never be an issue.

Q. Along those lines. When you were confronted with that by the FBI itself, were you telling the truth?

A. I told them the truth. I did that very voluntarily and eagerly and so forth. I was as eager as anyone could be to submit to any kind of interviews and so forth that the FBI wanted to put me through, and I did.

* * *

CROSS EXAMINATION

BY MR. PASHLEY:

* * *

Q. No problem. Now, during the course of your investigation you and Karen had an affair, I think that's a safe way to put it, isn't it?

A. I wouldn't put it that way, actually, and, again, I don't want to take up the time of the court. We engaged in sex together on a few occasions. I would never term that, by any definition, of an affair. We weren't going out to dinner together and we weren't going to movies, it was a very strange relationship.

Q. All right. Strictly sexual when you would go to see her at night, is that what you're saying?

A. Yes, sir.

Q. Sort of a wham bang, thank you, ma'am affair?

A. No, it wasn't that at all.

Q. That's the impression--

A. No, it wasn't that at all. I would never say anything demeaning like that about myself or about her. We talked. Generally, we talked about the case and on a few occasions we did engage in an intimate male-female sexual relationship.

Q. You had sexual intercourse, right?

A. That's what I just said.

Q. Oh, well, I just wanted to make sure.

A. I said an intimate sexual relationship is what I said.

Q. I just wanted to make sure there was no definitional impass there, all right. Now, going on. Over what period of time did the sexual relationship last?

A. As I said earlier and as I said repeatedly regarding this matter, it lasted, to the very best of my recollection, I'm guessing, sometime around beginning in July and that is strictly a guess.

Q. It started then or?

A. Started then.

Q. Okay.

A. Started then.

Q. July of what year now?

A. I am sorry, of 1989, once Karen is out at the Warren House and it would have continued, roughly, into the fall of that same year, the sexual relationship, and it was very sporadic, very infrequent.

Q. But it did exist?

A. Oh, I said that, it did exist and I am very ashamed of it.

Q. Of course, neither of you were married at the time, right?

A. I had been separated from my wife since 1986, had custody of my son, living at my mother's house and I divorced from that wife in 1989, excuse me, 1990, I am sorry, in November of 1990, if I remember correctly.

Q. Then you were married and she wasn't?

A. Correct.

* * *

Q. Mr. Merryman, was there an internal investigation by the Bureau via the FBI into your relationship with Karen Brewer?

A. Yes, there was.

Q. And as a result of that internal investigation, was there any sanction imposed?

A. Yes, there was.

Q. And was that an Administrative sanction?

A. Yes, sir.

Q. And would you tell me what that sanction was?

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A. I received a letter of censor which basically stated that I had used very poor judgment in my decision regarding my relationship with Karen and I received a two-week suspension without pay, which is very costly.

* * *